(19)

No. 04-104
Title: United States, Petitioner
v.
Freddie J. Booker
Docketed: July 21, 2004
Lower Ct: United States Court of Appeals for the Seventh Circuit
Case Nos.: (03-4225)
Decision Date: July 9, 2004
Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jul 21 2004	Petition for a writ of certiorari filed. (Response due July 28, 2004)
Jul 21 2004	Motion of the Acting Solicitor General to expedite consideration filed. (Vided)
Jul 21 2004	The respondent is directed to file responses to the petition for a writ of certiorari and to the motion to expedite consideration on or before 3 p.m., Wednesday, July 28, 2004.
Jul 23 2004	Letter from Acting Solicitor General, dated July 22, 2004, received. VIDED. (Distributed).
Jul 28 2004	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed. VIDED.
Jul 28 2004	Brief of respondent Freddie J. Booker filed.
Jul 28 2004	Response to motion to expedite consideration filed.
Jul 29 2004	Motion of petitioner to file reply brief in excess of page limits filed. (Distributed). VIDED.
Jul 29 2004	Reply brief of petitioner received.
Jul 29 2004	Reply of petitioner in support of motion to expedite consideration of petition and expedited briefing schedule filed. (Distributed) VIDED.
Aug 2 2004	Motion to file in excess of page limits GRANTED.
Aug 2 2004	Motion to expedite consideration filed by petitioner GRANTED.
Aug 2 2004	The motion of the Acting Solicitor General for leave to file a reply brief in excess of the page limits is granted. The petition for a writ of certiorari is granted. This case is consolidated with 04-105, and a total of two hours is allotted for oral argument. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, September 1, 2004. The briefs of respondents are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, September 21, 2004. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, September 27, 2004. Oral argument is set for Monday, October 4, 2004.
Aug 9 2004	CIRCULATED.
Aug 13 2004	Application (04A127) of the Acting Solicitor General to file petitioner's brief on the merits in excess of page limits, submitted to Justice Stevens.
Aug 13 2004	Application (04A127) to file in excess of page limits granted by Justice Stevens. The brief may not exceed 70 pages.
Aug 18 2004	Record received from U.S.C.A. - 7th Circuit. (1 envelope)
Aug 23 2004	Record received from U.S.D.C. - Western Dist. Wisconsin. (1 box - a portion of the record is sealed)
Aug 24 2004	SET FOR ARGUMENT Monday, Ocotober 4. 2004.

Aug 27 2004	Motion to dispense with printing the joint appendix filed by petitioner the Solicitor General (VIDED).
Sep 1 2004	Brief of petitioner United States filed. VIDED. (Distributed)
Sep 1 2004	Brief amici curiae of Orrin G. Hatch, Edward Kennedy, and Diane Feinstein filed. VIDED. (Distributed)
Sep 1 2004	Brief amici curiae of Ad Hoc Group of Former Federal Judges in support of neither party filed. (Distributed)
Sep 1 2004	Brief amicus curiae of United States Sentencing Commission filed. VIDED. (Distributed)
Sep 7 2004	Motion for divided argument filed by respondents. VIDED.
Sep 9 2004	Brief amicus curiae of Federal Public Defender, Northern District of Texas filed. VIDED. (Distributed)
Sep 16 2004	Motion of Ad Hoc Group of Former Federal Judges for leave to participate in oral argument as amicus curiae and for divided argument filed.
Sep 21 2004	Brief amicus curiae of National Association of Federal Defenders filed. VIDED. (Distributed)
Sep 21 2004	Brief of respondent Freddie J. Booker filed. VIDED. (Distributed)
Sep 21 2004	Brief amicus curiae of New York Counsel of Defense Lawyers filed. VIDED. (Distributed)
Sep 21 2004	Brief amicus curiae of Families Against Mandatory Minimums filed. VIDED. (Distributed)
Sep 21 2004	Brief amici curiae of Washington Legal Foundation and Allied Educational Foundation filed. VIDED. (Distributed)
Sep 21 2004	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. VIDED. (Distributed)
Sep 21 2004	Brief amicus curiae of Thomas F. Liotti filed. VIDED. (Distributed)
Sep 27 2004	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Sep 27 2004	Motion for divided argument filed by respondent GRANTED. Counsel must be prepared to discuss both questions presented.
Sep 27 2004	Motion of Ad Hoc Group of Former Federal Judges for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
Sep 27 2004	Reply of petitioner United States filed. VIDED. (Distributed)
Oct 4 2004	Argued. For petitioners: Paul D. Clement, Acting Solicitor General, Department of Justice, Washington, D.C. For respondent Booker: T. Christopher Kelly, Madison, Wis. For respondent Fanfan: Rosemary Scapicchio, Boston, Mass.
Oct 6 2004	Letter from the Acting Solicitor General proposing a lodging received. (Distributed) VIDED.
Oct 8 2004	LODGING approved and received (forty copies of Estimated Number of Cases Possibly Impacted by Blakely received from the Acting Solicitor General) (DISTRIBUTED). VIDED.
Oct 13 2004	Letter from counsel for the respondent Fanfan, dated October 8, 2004, objecting to the Memorandum lodged by the Acting Solicitor General received. VIDED. (Distributed).

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

FREDDIE J. BOOKER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.

2. If the answer to the first question is "yes," the following question is presented: whether, in a case in which the Guidelines would require the court to find a sentence-enhancing fact, the Sentencing Guidelines as a whole would be inapplicable, as a matter of severability analysis, such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the offense of conviction.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Constitutional, statutory and guidelines provisions involved	1
Statement	2
1. The underlying facts	2
2. The district court proceedings	2
3. The courts of appeals' decision	3
Reasons for granting the petition	7
A. *Blakely* has unsettled understandings about the inapplicability of *Apprendi* to the Sentencing Guidelines	9
B. The courts of appeals are in conflict over the applicability of *Blakely* to federal guidelines sentencing	11
C. The lower Federal courts are acutely in need of guidance on the proper sentencing procedures if *Blakely* is found applicable to the Sentencing Guidelines	14
D. The questions presented are of enormous importance	19
E. The Court should resolve the questions presented in this case	22
F. Expedited review is warranted	27
Conclusion	28
Appendix A	1a
Appendix B	26a
Appendix C	28a
Appendix D	31a
Appendix E	33a

TABLE OF AUTHORITIES

Cases:	Page
Alaska Airlines, Inc. v. *Brock*, 480 U.S. 678 (1987)	15
Apprendi v. *New Jersey*, 530 U.S. 466 (2000)	4, 7, 9
Blakely v. *Washington*, 124 S. Ct. 2531 (2004)	3, 5 7, 8, 9, 10, 16, 21, 25
Buckley v. *Valeo*, 424 U.S. 1 (1976)	15
Carlson v. *Green*, 446 U.S. 14 (1980)	23
Champlin Ref. Co. v. *Corporation Comm'n*, 286 U.S. 210 (1932)	15
Edwards v. *United States*, 523 U.S. 511 (1998)	5, 7
Iran Nat'l Airlines Corp. v. *Marschalk Co.* 453 U.S. 919 (1981)	27
Kolstad v. *American Dental Ass'n*, 527 U.S. 526 (1999)	23
Koon v. *United States*, 518 U.S. 81 (1996)	16
Minnesota v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999)	15
Mistretta v. *United States*, 488 U.S. 361 (1989)	8, 23
Newport v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981)	23
Ring v. *Arizona*, 536 U.S. 584 (2002)	9
United States v. *Banks*, 340 F.3d 683 (8th Cir. 2003)	10
United States v. *Caba*, 241 F.3d 98 (1st Cir. 2001)	10
United States v. *Cannady*, 283 F.3d 641 (4th Cir.), cert. denied, 537 U.S. 936 (2002)	10
United States v. *Casas*, 356 F.3d 104 (1st Cir.), cert. denied, 124 S. Ct. 2405 (2004)	10
United States v. *Childs*, No. 03-2056 (N.D. Iowa July 8, 2004)	13
United States v. *Croxford*, 2004 WL 1521560 (D. Utah July 7, 2004)	12, 17

Cases—Continued:	Page
United States v. *Einstman*, 2004 WL 157622 (S.D.N.Y. July 14, 2004)	17, 18
United States v. *Fanfan*, No. 03-47-P-H (D. Me June 28, 2004), appeal pending, No. 04-1946 (1st Cir. docketed July 19, 2004), petition for cert. pending (filed July 21, 2004)	12, 18, 24
United States v. *Floyd*, 343 F.3d 363 (5th Cir. 2003), cert. denied, 124 S. Ct. 219 (2004)	10
United States v. *Hammoud*, No. 03-4253 (4th Cir. June 30, 2004)	14
United States v. *Lamoreaux*, 2004 WL 1557283 (W.D. Mo. July 7, 2004)	17
United States v. *Lazcano-Flores*, No. 04-45 (S.D. Iowa July 8, 2004)	13
United States v. *Leach*, No. 02-172-14 (E.D. Pa. July 13, 2004)	12, 18
United States v. *Luciano*, 311 F.3d 146 (2d Cir. 2002), cert. denied, 124 S. Ct. 1185 (2004)	10
United States v. *Mendez-Zamora.*, 296 F.3d 1013 (10th Cir.), cert. denied, 537 U.S. 1063 (2002)	10
United States v. *Merritt*, 361 F.3d 1005 (7th Cir. 2004)	10
United States v. *Mistretta*, 486 U.S. 1054 (1988)	24
United States v. *Montgomery*: 2004 WL 1562904 (6th Cir. July 14, 2004)	14
2004 WL 1535646 (D. Utah July 8, 2004)	12
United States v. *Ochoa*, 311 F.3d 1133 (9th Cir. 2002)	10
United States v. *Olivera-Hernandez*, No. 2:04CR0013 (D. Utah July 12, 2004)	13
United States v. *Ortiz*, 318 F.3d 1030 (11th Cir. 2003)	10
United States v. *Parmelee*, 319 F.3d 583 (3d Cir. 2003)	10

Cases—Continued: Page

United States v. *Penaranda*:
2004 WL 1551369 (2d Cir. July 12, 2004), certification docketed, No. 04-59 (July 13, 2004) 13, 14, 15, 19, 22, 25, 26
No. 03-1284 (filed Sept. 18, 2003) 26
United States v. *Pettigrew*, 346 F.3d 1139 (D.C. Cir. 2003) 10
United States v. *Pineiro*, 2004 WL 1543170 (5th Cir. July 12, 2004) 12, 13, 21
United States v. *Shamblin*, 2004 WL 146561 (S.D. W. Va. June 30, 2004) 12, 17, 18
United States v. *Tarwater*, 308 F.3d 494 (6th Cir. 2002) 10
United States v. *Toro*, 2004 WL 1575325 (D. Conn. July 8, 2004) 12, 18
United States v. *Watson*, Cr. No. 03-0146 (D.D.C. June 30, 2004) 12, 18
United States v. *Watts*, 519 U.S. 148 (1997) 5
Virginia Bankshares, Inc. v. *Sandberg*, 501 U.S. 1083 (1991) 23

Constitution, statutes and regulations:

U.S. Const. Amend. VI 4, 5, 6, 7, 10, 14, 22
18 U.S.C. 3553(a)(2)(A) 16
18 U.S.C. 3553(a)(2)(B) 16
18 U.S.C. 3553(a)(2)(C) 16
21 U.S.C. 841(a) 2
21 U.S.C. 841(a)(1) 2
21 U.S.C. 841(b) 7
21 U.S.C. 841(b)(1)(A)(iii) 2
28 U.S.C. 994(a)(1) 16
28 U.S.C. 994(b)(1) 10
28 U.S.C. 1254(2) 14, 25
28 U.S.C. 2106 23

Regulations—Continued: Page

United States Sentencing Guidelines:
§ 1B1.3 ..... 3, 20, 22
§ 2B1.1 18
§ 2D1.1(c)(2) 3
§ 2D1.1(c)(4) 3
§ 3C1.1 3
§ 5G1.1(a) 10
§ 6A1.3(b) 16

Miscellaneous:

http://www.ca7.uscourts.gov/farg/arg.fwx?caseno=03-4225 4
S. Rep. No. 225, 98th Cong., 1st Sess. (1983) 16
Robert L. Stern, et al., *Supreme Court Practice* (8th ed. 2002) 27
United States Sentencing Comm'n, *2002 Sourcebook of Federal Sentencing Statistics* 19, 20
U.S. Senate Committee on the Judiciary, Washington v. Blakely *and the Future of the Sentencing Guidelines: Hearing Before the Senate Judiciary Comm., 106th Cong., 2d Sess.* (2004) <http://judiciary.senate.gov/print_testimony.cfm.id=1260&wit=id_3669> 21
Blakely *Inapplicable to the Guidelines Audio*: <http: www.ca7.uscourts.gov/farg/arg.fwx?caseno=03-4225> .. 4

In the Supreme Court of the United States

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FREDDIE J. BOOKER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-27a) is not yet reported in the *Federal Reporter*, but is *available in* 2004 WL 1535858.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND GUIDELINES PROVISIONS INVOLVED

The relevant constitutional, statutory, and Sentencing Guidelines provisions involved are set forth in an appendix to the petition. App., *infra*, 31a-64a.

STATEMENT

After a jury trial in the United States District Court for the Western District of Wisconsin, respondent was convicted of possessing at least 50 grams of cocaine base with the intent to distribute it, in violation of 21 U.S.C. 841(a) and 841(b)(1)(A)(iii), and distributing cocaine base, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 360 months of imprisonment, to be followed by five years of supervised release. A divided court of appeals reversed and remanded for resentencing. App., *infra*, 1a-27a.

1. The underlying facts

On February 26, 2003, respondent sold a quantity of crack cocaine to a customer at the residence of a third party. Before the customer could leave, police officers responding to a criminal trespass complaint arrived and knocked on the door. The officers observed that the customer attempted to swallow what turned out to be crack cocaine. Respondent was apprehended outside the house and detained. Ultimately, the officers found a duffle bag that respondent admitted was his. The bag contained approximately $400, drug paraphernalia, and 92.5 grams of crack cocaine. Respondent gave a written statement to the police in which he admitted selling an additional 20 ounces (566 grams) of crack cocaine. Gov't C.A. Br. 7-10, 11-12; Presentence Report (PSR) 3-4.

2. The district court proceedings

On March 12, 2003, respondent was charged in a two-count indictment in the Western District of Wisconsin with possessing more than 50 grams of cocaine base with intent to distribute it and with distributing cocaine base, both in violation of 21 U.S.C. 841(a)(1). The jury found respondent guilty on both counts. The Presentence Report initially recommended that respondent be held responsible for possession of the 92.5 grams of crack cocaine that was found

in his duffle bag. PSR 6. That would have resulted in an offense level of 32 under the United States Sentencing Guidelines. See Sentencing Guidelines § 2D1.1(c)(4). In an addendum, the PSR adopted the government's position that respondent's relevant conduct under the Guidelines, see Sentencing Guidelines § 1B1.3, should also include the 20 additional ounces of crack cocaine that respondent had admitted selling. Gov't C.A. Br. 11-12.

At sentencing, the court held respondent responsible for the 20 additional ounces of crack cocaine. Sent. Tr. 7-8. That resulted in a total of 658.5 grams of crack cocaine, and an offense level of 36 under Sentencing Guidelines § 2D1.1(c)(2). See Sent. Tr. 7. The court added two additional levels for obstruction of justice under Sentencing Guidelines § 3C1.1, based on the court's finding that respondent had perjured himself at trial when he "knowingly denied any of the elements of the offense," in contradiction of the written statement he had made to the police on the day of his arrest. Sent. Tr. 9-10. Based on his extensive prior record, which included 23 prior convictions, respondent was placed in criminal history category VI. *Id.* at 9; PSR 6-16. His sentencing range was 360 months to life imprisonment. The court imposed a sentence of 360 months of imprisonment. Sent. Tr. 11.

3. The court of appeals' decision

a. On appeal, respondent initially argued that he was entitled to a new trial because the district court had erroneously limited his cross-examination of a government witness and that he was entitled to a new sentencing hearing because his sentence was based on his purportedly unreliable written statement made to police officers on the day of his arrest. Resp. C.A. Br. 13-27.

On June 24, 2004, this Court issued its decision in *Blakely* v. *Washington*, 124 S. Ct. 2531. Six days later, on respondent's motion for supplemental briefing, the court of appeals

ordered both parties to file briefs by July 2 addressing the applicability of *Blakely* to this case. Respondent argued that the the Sixth Amendment entitled him to be sentenced within the Guidelines range for defendants responsible for 92.5 grams of crack cocaine (rather than the 658.5 grams found by the judge) and that he was entitled to be sentenced without the two-level enhancement for obstruction of justice. The government argued that *Blakely* is inapplicable to the Guidelines. The court heard oral argument on July 6.[1]

b. On July 9, 2004, a divided panel of the court of appeals affirmed respondent's conviction, reversed his sentence, and remanded for further proceedings. The court "expedited [its] decision in an effort to provide some guidance to the district judges (and our own court's staff), who are faced with an avalanche of motions for resentencing in the light of" *Blakely*—which, the court stated, had "cast a long shadow over the federal sentencing guidelines." App., *infra*, 2a.

The court began by reciting this Court's holding in *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000), that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." App., *infra*, 3a. The court continued that in *Blakely*, this Court stated that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts*

[1] At oral argument, the government urged that, if a court finds that sentencing under the Guidelines must comport with *Blakely* and that there are enhancements under the Guidelines that are not established by the jury verdict or admitted by the defendant, the Guidelines as a whole cannot be applied and the court should impose a sentence, as a matter of its discretion, within the minimum and maximum statutory terms, giving due regard to Guidelines. An audio recording of the argument is available at <http://www.ca7.uscourts.gov/farg/arg.fwx?caseno=03-4225>. The government's unofficial transcript of the relevant excerpts of the argument, made from the recording, is reproduced at App., *infra*, 28a-30a.

reflected in the jury verdict or admitted by the defendant." *Ibid.* (quoting *Blakely*, 124 S. Ct. at 2537). Under those holdings, the court concluded, "[t]he maximum sentence that the district judge could have imposed in this case (without an upward departure), had he not made any findings concerning quantity of drugs or obstruction of justice, would have been 262 months, given [respondent's] base offense level of 32 * * * and the defendant's criminal history" under the Guidelines. App., *infra*, 3a-4a. The court thus determined that, absent the defendant's consent, *Blakely* precluded the judge from making additional factual findings that would increase respondent's Guidelines sentence. *Id.* at 9a.

The court rejected a distinction between the federal guidelines at issue here and the state statutory guidelines at issue in *Blakely* based on "the fact that the [federal] guidelines are promulgated by the U.S. Sentencing Commission rather than by a legislature." App., *infra*, 4a. "The Commission is exercising power delegated to it by Congress," the court reasoned, "and if a legislature cannot evade what the Supreme Court deems the commands of the Constitution by a multistage sentencing scheme neither, it seems plain, can a regulatory agency." *Ibid.* The court also rejected the contention that this Court's prior decisions in *Edwards* v. *United States*, 523 U.S. 511 (1998), and *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam), established the constitutionality of judicial factfinding that supports sentence enhancements under the Guidelines. App., *infra*, 9a-11a.

The court concluded that "the guidelines, though only in cases such as the present one in which they limit defendants' right to a jury and to the reasonable-doubt standard * * * violate the Sixth Amendment as interpreted by *Blakely*." App., *infra*, 8a-9a. Accordingly, the court held, respondent "has a right to have the jury determine the quantity of drugs he possessed and the facts underlying the determination that he obstructed justice." *Id.* at 11a.

The court then remanded the case to the district court for resentencing. It noted that, if the government sought a higher Guidelines sentence than 262 months of imprisonment, the district court would have to determine whether the "the aspect of the guidelines that [the court] believe[s] to be unconstitutional, namely the requirement that the sentencing judge make certain findings that shall operate as the premise of the sentence and that he make them on the basis of the preponderance of the evidence, may not be severable from the substantive provisions of the guidelines." App., *infra*, 12a. If that were the case, then "the guidelines would be invalid in their entirety" and the district judge would be "free as he was before the guidelines were promulgated to fix any sentence within the statutory range." *Id.* at 13a. Stating that the severability issue had "not been briefed or argued," however, the court declined to address it. *Ibid.* The court also declined to resolve procedural issues that might surround any effort to conduct a jury trial on the enhancement factors if the Guidelines were found to be severable. *Id.* at 12a.

The court of appeals thus held that "[t]he application of the guidelines in this case violated the Sixth Amendment as interpreted in *Blakely*." App., *infra*, 13a. But the court noted that it could not be "certain" that its holding was correct. *Id.* at 9a. "If our decision is wrong," the court concluded, "may the Supreme Court speedily reverse it." *Ibid.*[2]

c. Judge Easterbrook dissented. He disagreed with the majority "on both procedural and substantive grounds." App., *infra*, 14a. As a matter of procedure, he concluded that the court of appeals had no authority to hold the

[2] In an amendment to its order filed on July 13, 2004, the court added that "[b]ecause the government does not argue that [respondent's] Sixth Amendment challenge to the guidelines was forfeited by not being made in the district court, we need not consider the application of the doctrine of plain error." App., *infra*, 26a-27a.

Guidelines unconstitutional because any such holding would be inconsistent with this Court's cases, including *Edwards*, *supra*, which "held that a judge * * * may ascertain (using the preponderance standard) the type and amount of drugs involved, and impose a sentence based on that conclusion, as long as the sentence does not exceed the statutory maximum." *Id.* at 15a.

Substantively, Judge Easterbrook noted that this Court had repeatedly described the *Apprendi* rule as triggering Sixth Amendment protections for facts that increase the "*statutory* maximum." See App., *infra*, 18a (emphasis added) (citing *Apprendi*, 530 U.S. at 490; *Blakely*, 124 S. Ct. at 2537). In this case, he noted, Congress established the statutory maximum penalties for drug offenses in 21 U.S.C. 841(b). App., *infra*, 18a. The Guidelines, he reasoned, do not reduce that statutory authorization, but instead affect sentencing only after the degree of the offense has been established by the jury. *Id.* at 22a.

Judge Easterbrook also noted that, "[g]iven the matrix-like nature of the [Sentencing Guidelines] system and the possibility of departure," App., *infra*, 23a, "[e]ven if *Blakely*'s definition reaches regulations adopted by a body such as the Sentencing Commission, it requires an extra step (or three) to say that the jury must make the dozens of findings that matter to the Guidelines' operation in each case." *Id.* at 24a. Judge Easterbrook did not believe that *Blakely* had taken that step. *Ibid.*

REASONS FOR GRANTING THE PETITION

This Court's decision in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), has profoundly unsettled the federal criminal justice system. *Blakely* held that a Washington state sentence was imposed in violation of the Sixth Amendment jury-trial right because the sentencing judge was permitted to find an aggravating fact that authorized a higher sentence than the state statutory guidelines system otherwise per-

mitted. *Id.* at 2537-2538. The Court noted that "[t]he Federal Guidelines are not before us, and we express no opinion on them." *Id.* at 2538 n.9. The Court's decision in *Blakely*, however, has "cast a long shadow over the federal sentencing guidelines." App., *infra*, 2a. In particular, it has roiled the federal courts by raising doubts about the constitutionality of routine Guidelines sentencing procedures, employed for fifteen years since *Mistretta* v. *United States*, 488 U.S. 361, 396 (1989), under which sentencing judges find the facts necessary to arrive at a Guidelines sentencing range for each defendant.

The result has been a wave of instability in the federal sentencing system that has left the government, defendants, and the courts without clear guidance on how to conduct the thousands of federal criminal sentencings that are scheduled each month. The sheer volume of federal sentencings has resulted in virtually unprecedented uncertainty. The courts facing the problem have developed a range of mutually inconsistent approaches to federal sentencing. Those conflicting approaches could lead to the need for thousands—or even tens of thousands—of resentencing proceedings once the legal issues are settled. It could also lead to debilitating uncertainty about the proper length of federal sentences, which could cripple other aspects of the system, including plea bargaining practice. Ultimately, the uncertainty could hinder achievement of the crucial social goals at stake in the criminal justice system. The courts of appeals have already fallen into conflict over the implications of *Blakely* and one court of appeals has taken the extraordinary step of certifying questions to this Court in an effort to obtain authoritative guidance on the meaning of *Blakely* for federal sentencing. Further review is warranted on an expedited basis to help restore a stable footing to the federal system of criminal justice.

A. *Blakely* Has Unsettled Understandings About The Inapplicability Of *Apprendi* To The Sentencing Guidelines

In *Blakely*, the defendant was convicted in state court on his guilty plea to second-degree kidnapping, in which he admitted the use of a firearm. One Washington statute authorized a maximum term of ten years of imprisonment for the kidnapping offense. The state's statutory sentencing guidelines system, however, established a range of 49-53 months of imprisonment for his offense of second-degree kidnapping with a firearm, absent a judicial finding, by the preponderance of the evidence, of a "substantial and compelling reason[] justifying an exceptional sentence." 124 S. Ct. at 2535. The sentencing court found that Blakely's offense involved "deliberate cruelty" that justified an exceptional sentence and on that basis imposed a 90-month sentence. Interpreting the rule that it had first announced in *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."), and then applied in *Ring* v. *Arizona*, 536 U.S. 584, 602 (2002), the Court held in *Blakely* that, because "[t]he facts supporting that finding [of deliberate cruelty] were neither admitted by [the defendant] nor found by a jury," 124 S. Ct. at 2537, the "State's sentencing procedure did not comply with the Sixth Amendment," *id.* at 2538. The Court stated that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Id.* at 2537. See *ibid.* ("[T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.").

The Court in *Blakely* did not reach the question whether *Blakely* applies to the federal Sentencing Guidelines. 124 S. Ct. at 2538 n.9. But the dissenting opinions stated that the majority's reasoning placed the Guidelines in jeopardy. *Id.* at 2549-2550 (O'Connor, J., dissenting); *id.* at 2561 (Breyer, J., dissenting). *Blakely* has indeed had the effect of raising questions about the Guidelines' validity that had previously been regarded as settled.

After this Court's decision four years ago in *Apprendi*, defendants frequently argued that the Sixth Amendment is violated when the judge makes a factual finding under the Sentencing Guidelines that increases the defendant's sentencing range and that results in a more severe sentence than would have been justified based solely on the facts found by the jury. Before *Blakely*, every court of appeals with criminal jurisdiction rejected that argument.[3] The uniform course of appellate decisions reasoned that "the holding in *Apprendi* applies only when the disputed 'fact' enlarges the applicable statutory maximum and the defendant's sentence exceeds the original maximum." *United States* v. *Caba*, 241 F.3d 98, 101 (1st Cir. 2001). Because the Sentencing Guidelines cap the defendant's sentence at the maximum provided by statute for the offense of conviction,

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[3] See, *e.g.*, *United States* v. *Casas*, 356 F.3d 104, 128 (1st Cir.), cert. denied, 124 S. Ct. 2405 (2004); *United States* v. *Luciano*, 311 F.3d 146, 153 (2d Cir. 2002), cert. denied, 124 S. Ct. 1185 (2004); *United States* v. *Parmelee*, 319 F.3d 583, 592 (3d Cir. 2003); *United States* v. *Cannady*, 283 F.3d 641, 649 & n.7 (4th Cir.), cert. denied, 537 U.S. 936 (2002); *United States* v. *Floyd*, 343 F.3d 363, 372 (5th Cir. 2003), cert. denied, 124 S. Ct. 2190 (2004); *United States* v. *Tarwater*, 308 F.3d 494, 517 (6th Cir. 2002); *United States* v. *Merritt*, 361 F.3d 1005, 1015 (7th Cir. 2004); *United States* v. *Banks*, 340 F.3d 683, 684-685 (8th Cir. 2003); *United States* v. *Ochoa*, 311 F.3d 1133, 1134-1136 (9th Cir. 2002); *United States* v. *Mendez-Zamora*, 296 F.3d 1013, 1020 (10th Cir.), cert. denied, 537 U.S. 1063 (2002); *United States* v. *Ortiz*, 318 F.3d 1030, 1039 (11th Cir. 2003); *United States* v. *Pettigrew*, 346 F.3d 1139, 1147 n.18 (D.C. Cir. 2003).

see Sentencing Guidelines § 5G1.1(a); 28 U.S.C. 994(b)(1) (Guidelines sentencing range must be "consistent with all pertinent provisions of title 18"), the Guidelines never lead to the imposition of a sentence on a particular count that exceeds the statutory maximum. For that reason, the courts of appeals uniformly held that judicial factfinding in the application of the Guidelines at sentencing is constitutional under *Apprendi*. This Court's decision in *Blakely* shattered that consensus.

B. The Courts Of Appeals Are In Conflict Over The Applicability Of *Blakely* To Federal Guidelines Sentencing

In the 27 days since *Blakely*, the federal courts have been thrown into conflict on the continuing validity of the current federal sentencing regime. One court of appeals has held that the current regime is unconstitutional in a wide range of cases. A second court of appeals has upheld the validity of the Guidelines consistent with this Court's prior precedent and suggested that any implications of *Blakely* for the Guidelines must be drawn by this Court, rather than the lower federal courts. A third court of appeals, sitting en banc, has taken the extraordinary step of certifying questions to this Court, urging it to grant expedited review to settle the applicability of *Blakely* to judicial factfinding that results in upward adjustments under the Sentencing Guidelines. Two other courts of appeals have already granted en banc consideration of the issue.

1. In this case, the Seventh Circuit determined that respondent's increased Guidelines sentence, based on the sentencing court's finding of facts as required under the Guidelines, denied respondent his right to a jury trial under *Blakely*, and that, therefore, "[t]he application of the guidelines in this case violated the Sixth Amendment." App., *infra*, 13a. The court of appeals reserved judgment on the impact of *Blakely* on cases in which no additional fact finding

beyond the jury verdict is necessary to apply the Guidelines. *Id.* at 9a, 13a. But the court's holding still applies to a large number of federal criminal cases, in which the defendant's sentence under the Guidelines is increased by the sentencing court's factual findings (other than a prior conviction), and the defendant has not consented to factfinding by the judge.[4]

2. In contrast, the Fifth Circuit reached the opposite conclusion in *United States* v. *Pineiro*, 2004 WL 1543170 (July 12, 2004). In that case, the sentencing court made certain factual findings about drug quantity and the defendant's role in the offense that resulted in a much higher sentencing range under the Guidelines than would have been applicable based on the facts found by the jury alone. The Fifth Circuit affirmed the sentence, concluding that "[h]aving considered the *Blakely* decision, prior Supreme Court cases, and our own circuit precedent, we hold that *Blakely* does not extend to the federal Guidelines and that [the defendant's] sentence did not violate the Constitution." *Id.* at *1. The court stated that it "d[id] not believe that the Sentencing Commission can be thought of as having created

[4] A number of district courts have reached the same conclusion. In *United States* v. *Croxford*, 2004 WL 1521560 (D. Utah July 7, 2004), for example, the court held that "the inescapable conclusion of *Blakely* is that the federal sentencing guidelines have been rendered unconstitutional in cases such as this one," *id.* at *6, in which "the Guidelines require an upward enhancement of the defendant's sentencing range without a jury determination," *id.* at *9. See *e.g.*, *United States* v. *Shamblin*, 2004 WL 1468561, at *8 (S.D. W.Va. June 30, 2004). District courts in a number of other still-unreported cases have also held that the *Blakely* rule applies to the Sentencing Guidelines. See, *e.g.*, *United States* v. *Leach*, No. 02-172-14 (E.D. Pa. July 13, 2004); *United States* v. *Fanfan*, No. 03-47-P-H (D. Me. June 28, 2004), appeal pending, No. 04-1946 (1st Cir. docketed July 19, 2004), petition for cert. pending (filed July 21, 2004); *United States* v. *Toro*, 2004 WL 1575325 (D. Conn. July 8, 2004); *United States* v. *Montgomery*, 2004 WL 1535646 (D. Utah July 8, 2004); *United States* v. *Watson*, Cr. No. 03-0146 (D.D.C. June 30, 2004).

for each United States Code section a hundred different *Apprendi* 'offenses' corresponding to the myriad possible permutations of Guidelines factors, with each 'offense' then requiring jury findings on all of its (Guidelines-supplied) elements." 2004 WL 1543170, at *9.[5]

3. The disarray in the circuits is highlighted by the en banc Second Circuit's extraordinary order certifying to this Court questions pertaining to whether *Blakely* applies to sentencing under the Guidelines. *United States* v. *Penaranda*, 2004 WL 1551369 (2d Cir. July 12, 2004), certification docketed, No. 04-59 (July 13, 2004). The court of appeals found that it "cannot be certain whether a majority of [this] Court would extend the reasoning of *Blakely*" to the Guidelines. *Id.* at *4. The court observed that, while "[s]ome portions of the majority opinion in *Blakely* indicate that the decision does apply to the federal Sentencing Guidelines[,] * * * the distinct administrative provenance of the federal Sentencing Guidelines may place them outside the ambit of the *Blakely* principle." *Id.* at *5. And "even if *Blakely* applies to some aspects of sentencing under the Guidelines, it is unclear whether judicial fact-finding that determines the applicable Guidelines range is prohibited." *Id.* at *6.

The Second Circuit did not reach its own conclusions in *Penaranda*. Rather, it believed that the degree of uncertainty about the implications of *Blakely* raised such serious difficulties for the administration of criminal justice that this Court should have "an opportunity to adjudicate promptly the threshold issue of whether *Blakely* applies to the federal Sentencing Guidelines." 2004 WL 1551369, at *7. To that end, the en banc court certified questions to this Court under

[5] A number of district courts have agreed that *Blakely* does not extend to the Sentencing Guidelines. See, *e.g.*, *United States* v. *Olivera-Hernandez*, No. 2:04CR0013 (D. Utah July 12, 2004); United *States* v. *Lazcano-Flores*, No. 04-45 (S.D. Iowa July 8, 2004); *United States* v. *Childs*, No. 03-2056 (N.D. Iowa July 8, 2004).

28 U.S.C. 1254(2) and urged it to "entertain this certification * * * at [the Court's] earliest convenience, with an expedited briefing and hearing schedule * * * in order to minimize, to the extent possible, what we see as an impending crisis in the administration of criminal justice in the federal courts." *Id.* at *8. The recognition by the Second Circuit that, without a Supreme Court ruling, "defendants, victims, and the public will be left uncertain about what sentences are lawful," 2004 WL 1551369, at *7, underscores the need for prompt intervention by this Court.[6]

C. The Lower Federal Courts Are Acutely In Need Of Guidance On The Proper Sentencing Procedures If *Blakely* Is Found Applicable To The Sentencing Guidelines

The Court should also grant review to settle the question that necessarily arises if this Court were to hold, contrary to the government's position, that the principles of *Blakely* preclude a sentencing court (absent the defendant's consent) from finding facts (other than a prior conviction) that increase a defendant's sentence under the Sentencing Guidelines beyond the level indicated based solely on the jury's findings or the defendant's admissions. That remedial question need not be reached if the Court agrees with the government that the federal system is distinguishable from

[6] The need for prompt resolution of the questions presented is further highlighted by the fact that two other courts of appeals have already granted en banc review of the application of *Blakely* to the Guidelines. A few days after the decision in this case, a panel of the Sixth Circuit concluded that, in light of *Blakely*, the federal sentencing scheme violates the Sixth Amendment in a broad swath of federal criminal cases. *United States* v. *Montgomery*, 2004 WL 1562904, at *2 (6th Cir. July 14, 2004). The Sixth Circuit then sua sponte granted rehearing en banc on the issue and vacated the panel's decision. See *United States* v. *Montgomery*, No. 03-5256 (6th Cir. July 19, 2004). The Fourth Circuit has also granted en banc consideration of the issue. *United States* v. *Hammoud*, No. 03-4253 (4th Cir. June 30, 2004) (argument scheduled for August 2, 2004).

the state statutory guidelines system at issue in *Blakely*. But if the Court were to disagree, the remedial issues that follow would be of critical importance to restoring order to the federal sentencing system. Indeed, a holding by this Court that *Blakely* applies to the Guidelines, without any guidance on the remedial consequences, would threaten to paralyze federal sentencing or compel an enormous waste of resources as courts struggle with "various attempts to implement *Blakely* [that] ultimately may prove misguided." *Penaranda*, 2004 WL 1551369, at *7.

1. The most important question would be one of severability. When a court finds some parts of a statutory scheme unconstitutional, the court must inquire into the severability of the remaining provisions. *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987). The question whether the unconstitutional provisions are severable turns on an assessment of whether Congress would have enacted the remaining provisions absent the others. See *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999) ("The inquiry into whether a statute is severable is essentially an inquiry into legislative intent."). When "it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not," *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976) (quoting *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U.S. 210, 234 (1932)), a statutory scheme is not severable and cannot stand in the face of the unconstitutionality of particular features. Under that analysis, if *Blakely* renders unconstitutional a judge's assessment of facts that increase a defendant's Guidelines sentence, the balance of the Sentencing Guidelines is not severable from the unconstitutional judicial factfinding procedures.

The novel scheme that would result from superimposing jury trials on the Guidelines sentencing process would give birth to a radically different system from the one that Con-

gress enacted and the Sentencing Commission created. The Guidelines serve the important goal of seeking to avoid unwarranted sentencing disparities between similarly situated defendants resulting from divergent judicial decisions in an indeterminate sentencing system. See *Koon* v. *United States*, 518 U.S. 81, 92 (1996); 28 U.S.C. 991(b)(1)(B); S. Rep. No. 225, 98th Cong., 1st Sess. 52 (1983). The Guidelines were plainly designed and written for application by judges, *e.g.*, 28 U.S.C. 994(a)(1); Sentencing Guidelines § 6A1.3(b), and their complexity and holistic nature would defy coherent application with an overlay of *Blakely* procedures. The transformation of the jury into the factfinder on the myriad of issues that the Guidelines often require to be resolved would introduce procedural complications (*e.g.*, bifurcation, complicated jury instructions, elaborate special verdicts) that the federal system has never applied in the ordinary case. To superimpose *Blakely* on the Guidelines in pending cases awaiting sentencing could have the effect of precluding most upward adjustments that the Guidelines would require, because, as the court of appeals noted, there could be double jeopardy objections to reconvening a jury to decide facts relevant only to upward adjustments at sentencing. App., *infra*, 12a. That would seriously thwart the intention of Congress and the Commission to provide for sentences sufficient "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," "to afford adequate deterrence to criminal conduct," and "to protect the public from further crimes of the defendant." 18 U.S.C. 3553(a)(2)(A), (B), and (C).

Accordingly, in any case in which *Blakely* would preclude the sentencing court from making findings required under the Guidelines, the Guidelines as a whole cannot be implemented as intended, and the court should therefore sentence the defendant in its discretion within the maximum and minimum provided by statute for the offense of conviction.

In doing so, the court should pay due regard to the relevant Guidelines provisions, as an informed and expert body of knowledge on sentencing issues.

2. Although the court of appeals in this case did not resolve how the district court should proceed on remand, the court recognized that the government's position that the Guidelines are not severable "may be right" and that "the requirement that the sentencing judge make certain findings that shall operate as the premise of the sentence and that he make them on the basis of the preponderance of the evidence * * * may not be severable from the substantive provisions of the guidelines." App., *infra*, 12a. In *United States* v. *Croxford*, 2004 WL 1521560 (D. Utah July 7, 2004), Judge Cassell reached that holding, concluding that the Guidelines were not severable. After a careful analysis of the options facing the court, see 2004 WL 1521560, at *10-*13, the court concluded that, in cases where the Guidelines require judicial factfinding on upward adjustments, *id.* at *9, it would sentence the defendant "by making a full examination of the relevant evidence and imposing an appropriate sentence within the statutory range set by Congress," *id.* at *13, while considering the "Guidelines as providing useful instruction on the appropriate sentence," *id.* at *15.[7]

3. In contrast, other courts that have applied *Blakely* to the Guidelines have persisted in applying the Guidelines framework, but have limited the sentencing court to the imposition only of a Guidelines sentence whose maximum term is supported by jury findings or admissions by the defendant. *United States* v. *Shamblin*, 2004 WL 1468561, at *8 (S.D. W.Va. June 30, 2004), exemplifies this approach. There, the court found that "the upper bound of the appro-

[7] Other district courts have reached the same conclusion. See, *e.g.*, *United States* v. *Einstman*, 2004 WL 1576622 (S.D.N.Y. July 14, 2004) (pre-sentencing memorandum and order); *United States* v. *Lamoreaux*, 2004 WL 1557283 (W.D. Mo. July 7, 2004).

priate [Guidelines] sentencing range, based on facts proven to a jury beyond a reasonable doubt or admitted by the defendant, establishes the relevant statutory maximum for *Apprendi* purposes." 2004 WL 1468561, at *8. The court conceded that that approach leads to "an artificial application of the Guidelines" because "in drug cases, the amounts of offense conduct and relevant conduct are integral to the determination of sentencing range." *Ibid.* The court nonetheless believed that it was bound to apply the Guidelines in that manner, and therefore reduced the defendant's sentence from imprisonment for 20 years to imprisonment for twelve months. *Id.* at *9.[8]

Under many Guidelines provisions, conviction of an offense, standing alone, triggers a low base offense level, with higher sentences keyed to a judge's findings that the offense involved aggravating factors. Under the fraud Guideline, for example, the base offense level is six or seven, corresponding to a sentence of 0-6 months of imprisonment, for conviction of a fraud offense, but the level can be increased up to 30 levels for the amount of the loss and other aggravating factors. Sentencing Guidelines § 2B1.1. At least in pending cases, in which the jury will not have found the aggravating facts, a conclusion that the Guidelines are severable could produce absurdly low sentences for very serious criminal conduct. See *United States* v. *Einstman*, 2004 WL 1576622, at *6 (S.D.N.Y. July 14, 2004) ("[I]t seems evident * * * that Congress would never have countenanced a Guidelines system in which all first-time offenders

[8] Other district courts have reached the same conclusion. See, *e.g.*, *United States* v. *Fanfan*, *supra* (reducing sentencing range from 188-235 months to 63-78 months of imprisonment); *Leach*, *supra* (reducing sentencing range from 360 months to life imprisonment to 210-262 months of imprisonment); *Watson*, *supra* (reducing sentence from 72 months to 16 months of imprisonment and immediately releasing the defendant); *Toro*, *supra* (reducing sentence from 24 months to 6 months of imprisonment).

who pled guilty to the elements of wire, mail or bank fraud, and nothing more, were limited to a sentence of 0-6 months * * * without regard to the amount of the fraud, its sophistication, or the role played by the defendant in the conspiracy. Such sentences make a mockery of the real (not 'relevant') statutory maxima that have been set by the Legislative Branch, and effectively eviscerate Congress's expressed intention that * * * a schemer who defrauds his employer be eligible for as much as five years in prison.").

4. Still other alternatives are possible. The court of appeals in this case observed that one potential approach would be to convene "a sentencing hearing at which a jury will have to find by proof beyond a reasonable doubt the facts on which a higher sentence would be premised." App., *infra*, 11a. The court noted, however, that doing so would raise questions in any case, such as the present one, in which the necessary facts have not been alleged in the indictment. *Id.* at 12a. See also *Penaranda*, 2004 WL 1551369, at *7 (noting possibility of "recalling the jury that convicted the defendant to determine whether the facts warranting an enhancement under the Guidelines have been proven"). No sentencing court can be confident that any particular approach it selects will survive review under the rule ultimately laid down by this Court.

D. The Questions Presented Are Of Enormous Importance

The questions presented in this case are of great public importance and warrant immediate resolution.

1. First, a potentially enormous number of cases is involved. There are approximately 64,000 federal criminal defendants sentenced under the Guidelines each year. See United States Sentencing Comm'n, *2002 Sourcebook of Federal Sentencing Statistics*, at Table 2. That means that an average of approximately 1200 federal sentencings take place each week. Given the current disarray, a very large

percentage of those cases may result in unlawful sentences. The number of federal cases affected by the questions presented in this case will increase daily until this Court is able to address the issues.

Second, the Court's resolution of the questions presented will significantly affect the length of sentences in many of those cases. In the short time since *Blakely*, many courts have reduced sentences below otherwise-applicable Guidelines levels; other courts have elected to move to indeterminate sentencing; and still others have adhered to the Sentencing Guidelines. The effect on the sentence can be substantial.

Third, the uncertainty about how to proceed with federal sentencing imposes burdens on prosecutors, defense counsel, and federal trial and appellate courts. Especially insofar as courts attempt to apply the Guidelines with a *Blakely* overlay of jury findings, a host of complicated procedural issues must be confronted. These would include instructing the jury on Guidelines factors that were never intended for its use (see, *e.g.*, the Relevant Conduct Guideline, § 1B1.3, and its nine pages of application notes); possibly bifurcating the trial into guilt and sentencing phases; and determining the proper procedures for *Blakely* waivers in guilty pleas. All of these issues, and many more, will be fruitful sources for extensive litigation and appeals. All this could turn out to be unnecessary depending on this Court's resolution of the questions presented.

Fourth, the ramifications of the current instability are unsettling areas beyond sentencing. Although approximately 97.1% of federal criminal cases are ordinarily resolved by guilty pleas, see United States Sentencing Comm'n, *supra*, at Fig. C, uncertainty about the sentencing regime that will be applied has made it more difficult for the government and defendants to reach plea agreements. Some defendants may decide to stand trial, rather than enter a plea without

knowing what sentencing process will apply to them.[9] The volume of criminal cases means that even a modest shift from pleas to trials could have enormous consequences for the federal system. Even an increase from 3% to 6% in the number of defendants who stand trial would double the volume of cases that must be adjudicated. That increase would greatly aggravate the burden on courts, prosecutors, defendants, and defense counsel.

2. Although the courts of appeals have disagreed on the merits, they have agreed on the need for this Court's prompt action. See App., *infra*, 2a ("We cannot of course provide definitive guidance; only the Court and Congress can do that."); *Pineiro*, 2004 WL 1543170, at *9 ("We trust that the question presented in cases like this one will soon receive a more definitive answer from the Supreme Court, which can resolve the current state of flux and uncertainty; and then, if necessary, Congress can craft a uniform, rational, nationwide response."). As Judge Easterbrook noted, the "likely consequence" of holding the Guidelines unconstitutional is "bedlam," and, while the lower "courts are bound to favor different recipes" for sentencing, "[t]he Supreme Court alone can make a definitive judgment." App., *infra*, 14a (dissenting opinion). Judge Easterbrook concluded that "[t]oday's decision will discombobulate the whole criminal-law docket. I trust that our superiors will have something to say about this. Soon." *Ibid.*

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[9] On July 13, 2004, District Judge Cassell testified before the Senate Committee on the Judiciary that, in one district, *Blakely* has led to "delayed guilty pleas," "extended plea colloquies," and "added time and effort spent on cases which would have resulted in a plea but now require trial" and, in another, "pleas and sentencings have almost come to a halt." Blakely v. Washington *and the Future of the Sentencing Guidelines: Hearing Before the Senate Judiciary Comm.*, 106th Cong., 2d Sess. at *8-*10 (2004) (statement of Hon. Paul Cassell, Judge, United States District Court Judge for the District of Utah), *available in* <http://judiciary.senate.gov/print_testimony.cfm?id=1260&wit_id=3669>.

The Second Circuit similarly implored the Court to act quickly to resolve the questions presented in its opinion in *Peneranda*. The court of appeals explained that *Blakely* "raises the prospect that many thousands of future sentences may be invalidated or, alternatively, that district courts simply will halt sentencing altogether pending a definitive ruling by the Supreme Court." *Penaranda*, 2004 WL 1551369, at *6. The court was "convinced that a prompt and authoritative answer to" what it termed "the pall of uncertainty" on federal sentencing "is needed to avoid a major disruption in the administration of criminal justice in the federal courts—disruption that would be unfair to defendants, to crime victims, to the public, and to the judges who must follow applicable constitutional requirements." *Ibid.* The court noted that "[m]any, if not all, of the[] various attempts to implement *Blakely* ultimately may prove misguided—or even wholly unnecessary." *Id.* at *7. But "[i]n the meantime, * * * defendants, victims, and the public will be left uncertain as to what sentences are lawful." *Ibid.*

E. The Court Should Resolve The Questions Presented In This Case

The court of appeals squarely held that *Blakely*'s Sixth Amendment holding extends to the Guidelines, and this Court should promptly review that holding. The question whether any unconstitutional aspects of the Guidelines scheme are severable from the remainder is also properly raised in this petition. The Court should grant review to address that issue as well, if *Blakely* is held applicable to the Guidelines.

1. Although the court of appeals remanded for the district court to determine how to proceed at sentencing, rather than resolving that issue itself, the court of appeals' action does not detract from the appropriateness of granting certiorari on that issue. The Court has jurisdiction to do so.

A grant of certiorari would bring before the Court the entire case, including the severability question of how, if *Blakely* applies to the Guidelines, the sentencing court is to proceed on remand. See 28 U.S.C. 2106 ("The Supreme Court * * * may affirm, *modify*, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, *and may remand the cause and * * * require such further proceedings to be had as may be just under the circumstances.*") (emphasis added). In instances in which the Court has confronted questions of law that "are currently in a state of evolving definition and uncertainty," *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981), it has reached the merits, despite procedural obstacles, in order to settle an "important" issue that "appears likely to recur." Cf. *id.* at 257 (overlooking the plain error rule where declining to review the issue on the merits "would serve neither to promote the interests of justice nor to advance efficient judicial administration").[10] While the Court normally does not review an issue not presented or passed on below, in exceptional cases, it will. See *Carlson* v. *Green*, 446 U.S. 14 (1980) (deciding question not pressed or passed on in the lower courts, because it "is an important, recurring issue and is properly raised in another petition for certiorari being held pending disposition of this case," and "the interests of judicial administration will be served by addressing the issue on its merits.").

In *Mistretta* v. *United States*, 488 U.S. 361, 396 (1989), in the context of an earlier challenge to the Guidelines, this

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[10] See *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) (reaching issue decided, though not pressed, below because of the "uncertainty" surrounding the issue and its "importance to the administration of federal law"); see also *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526, 540-541 (1999) (resolving legal standards governing principal's liability for punitive damages for actions of its agents under Title VII, although the court below did not reach that issue).

Court granted certiorari on a severability question presented by the government that had not been decided below. In that case, the district court had ruled that the Sentencing Guidelines were constitutional, and it therefore did not reach any issue of severability. Both the government and the defendant petitioned for certiorari before judgment in *Mistretta*. The government's petition presented three questions. Two of them addressed the constitutionality of the Guidelines—the only question addressed by the district court. 87-1904 Pet. at i. The third question, however, was "[w]hether, if the sentencing guidelines are invalid, the 1984 amendments to the statutes governing parole and 'good time' credits are severable and therefore apply to defendants sentenced for crimes committed after November 1, 1987." *Ibid.* The petition explained that the issue was of great importance, that it had divided the district courts, and that, if the Court struck down the Guidelines without resolving the issue, "the current confusion within the federal sentencing system will continue until another case raising those issues reaches this Court." *Id.* at 18. The defendant's petition also presented a severability question, 87-7028 Pet. at i, 7-9, noting that "[i]n order to prevent mass confusion and a flood of federal *habeas corpus* petitions * * *, this Court should address the severability question in this proceeding." *Id.* at 9. The Court granted certiorari on both petitions in full. 486 U.S. 1054 (1988). The same logic dictates a grant of certiorari on the severability issue in this case.

2. The government is also filing today a petition for a writ of certiorari before judgment in *United States* v. *Fanfan*, No. 03-47-P-H (D. Me. June 28, 2004), appeal pending, No. 04-1946 (1st Cir. docketed July 19, 2004). In *Fanfan*, the district court determined that the rule in *Blakely* is applicable to the Guidelines, and it went on to hold that the court was therefore limited to sentencing the defendant to a maximum term under the Guidelines based

solely on the facts found by the jury. Applying a Guidelines range of 63-78 months, rather than the range of 188-235 months that it found that the Guidelines otherwise required, the court sentenced the defendant to a term of 78 months of imprisonment. *Fanfan* thus resolved both questions presented in the petition in this case, and it provides an appropriate companion vehicle for this Court to consider, in a concrete context, the implications of *Blakely* for federal sentencing. The government suggests that the Court grant the petitions both in this case and in *Fanfan* to assure that the Court has a vehicle in which to reach and resolve the vitally important issues presented. Simultaneous grants of review here and in *Fanfan* would protect against any possibility that later impediments to review in one or the other case might prevent timely resolution of the issues.

3. The en banc Second Circuit has certified three questions to this Court under 28 U.S.C. 1254(2), urging the Court to decide "the threshold issue of whether *Blakely* applies to the federal Sentencing Guidelines." *United States* v. *Penaranda*, 2004 WL 1551369, at *7. While the government agrees with the Second Circuit on the need for expedited resolution of that issue, *Penaranda* provides a less suitable vehicle for resolving the issues than this case and *Fanfan*. First, each of the Second Circuit's certified questions is a variation on the same theme: whether *Blakely* applies to the Guidelines. Unlike the petition in this case, the Second Circuit's certification order does not encompass any question concerning the consequences of holding *Blakely* applicable to the Guidelines. That is not because the Second Circuit regards that issue as unimportant. The court of appeals clearly recognized that "once a court concludes that *Blakely* applies to the Guidelines, it is without guidance as to the means for achieving compliance," *Penaranda*, *id.* at *7, and graphically illustrated the vital need for resolution of that issue by cataloguing five different approaches taken by

district courts and noting the uncertainty that will prevail "while these judicial approaches are being litigated." *Ibid.* But the Second Circuit's certified questions would not permit the Court to reach and resolve those remedial issues. In contrast, the petition for certiorari here squarely raises that issue.

Second, both of the two defendants involved in the *Penaranda* certification (Penaranda and Rojas) raised other issues on appeal.[11] If Penaranda is successful in obtaining a new trial, his sentencing challenges would become moot, at least pending conviction at a retrial. The same might not be true for Rojas, who challenges only the procedures at sentencing, but an advantage of the petition in this case is that the court of appeals has rejected all other challenges raised by the defendant aside from the *Blakely* challenge. App., *infra*, 22a.

Finally, in this case the Court has the benefit of a concrete judgment examining the applicability of *Blakely*; in *Penaranda*, no court has rendered a decision resolving the *Blakely* issues. This case also has the benefit of questions presented that were formulated by the petitioning party, in accordance with the customary practice of this Court. The adversary system contemplates that the parties will normally frame the questions for courts to review. While Congress has retained certification by a court of appeals as a

[11] In *United States* v. *Rojas*, No. 03-1062(L), the defendant has raised the issue "[w]hether Mr. Rojas' Sixth Amendment rights were violated by the government's suppression of evidence at the *Fatico* [sentencing] hearing." Br. 2, 17-22 (filed Dec. 9, 2003). In *United States* v. *Penaranda*, No. 03-1284(L), the defendant raises three issues challenging the fairness of his trial and seeking a new trial. Br. 4-5, 60 (filed Sept. 18, 2003). The Second Circuit did not grant en banc review on those issues, but instead left them for resolution "in the normal course by the panels to which the cases are assigned." *Penaranda*, at *1 n.1; see *id.* at *8 n.10 (noting that court's transmission of the records to this court was "not to suggest that the Court should decide the entirety of the matters in controversy").

mode of Supreme Court review, it has rarely been employed in recent years. See Robert L. Stern, et al., *Supreme Court Practice* §§ 9.1, 9.3 (8th ed. 2002). Adherence to the normal adversary mode of review has the advantage of settled and well-understood procedures.[12]

F. Expedited Review Is Warranted

In light of the urgent need for this Court's resolution of the questions presented and the thousands—or even tens of thousands—of criminal sentencings that will be thrown into doubt until such resolution can be achieved, this Court should expedite consideration of the petition and, if review is granted, the case on the merits. The need for expedition is so great that this Court should consider setting a timetable that permits argument to be held before the Court's scheduled argument sessions in the October 2004 Term. The government today is filing a motion for expedited consideration, proposing schedules for the Court's hearing of this case and *United States* v. *Fanfan*. The motion proposes a schedule under which the Court would order responses to the petitions to be filed in time for this Court to decide whether to grant certiorari by August 2. If certiorari is granted on that date, the government proposes a schedule that would give each side two weeks for its principal brief on the merits (the government's briefs would be due on August 16, respondents' briefs due on August 30). The government's reply briefs would be due on September 8, and the Court could then hear oral argument September 13. That schedule would permit the Court to return a degree of stability to the federal sentencing system at the earliest possible date. An alternative schedule would allow for

[12] After deciding this case and *Fanfan*, the Court could dispose of *Penaranda* as appropriate. Cf. *Iran Nat'l Airlines Corp.* v. *Marschalk Co.*, 453 U.S. 919 (1981) (disposing of certified questions in light of Court's decision on merits in case raising similar issue).

argument on the first scheduled day of the October 2004 Term, with corresponding adjustments to the briefing schedule.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2004

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 03-4225

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

FREDDIE J. BOOKER, DEFENDANT-APPELLANT

Argued July 6, 2004
Decided July 9, 2004

Appeal from the United States District Court for the Western District of Wisconsin, No. 03-CR-026-S-01-John C. Shabaz, Judge

POSNER, Circuit J.

A jury found the defendant guilty of possessing with intent to distribute at least 50 grams of cocaine base, for which the statute prescribes a minimum sentence of 10 years in prison and a maximum sentence of life. 21 U.S.C. § 841(b)(1)(A)(iii). At sentencing, the judge found by a preponderance of the evidence that the defendant (1) had distributed 566 grams over and above the 92.5 grams that the jury had to have found (for the defendant did not contest that it was the amount of crack in his duffel bag—he just claimed he hadn't put it there) and (2) had obstructed justice. Under the federal sentencing guidelines, the additional quantity finding

increased the defendant's base offense level from 32 to 36, U.S.S.G. §§ 2D1.1(c)(2), (4). The effect, together with that of the enhancement that the guidelines prescribe for obstruction of justice, U.S.S.G. § 3C1.1, was to place the defendant in a sentencing range of 360 months to life. The judge sentenced him to the bottom of the range. The appeal challenges the sentence on the ground that the sentencing guidelines violate the Sixth Amendment insofar as they permit the judge to find facts (other than facts relating to a defendant's criminal history) that determine the defendant's sentencing range. There is also a challenge to the conviction, based on the judge's limiting the scope of cross-examination, but so obviously harmless was that error (if it was an error) that we will move immediately to the sentencing issue.

We have expedited our decision in an effort to provide some guidance to the district judges (and our own court's staff), who are faced with an avalanche of motions for resentencing in the light of *Blakely* v. *Washington*, — U.S. —, 124 S. Ct. 2531, — L. Ed. 2d —, 2004 WL 1402697 (U.S. June 24, 2004), which has cast a long shadow over the federal sentencing guidelines. We cannot of course provide definitive guidance; only the Court and Congress can do that; our hope is that an early opinion will help speed the issue to a definitive resolution.

Blakely invalidates under the Sixth Amendment (which had of course long been held applicable to state criminal proceedings by an interpretation of the Fourteenth Amendment) a statute of the State of Washington that authorized the sentencing judge to impose a sentence above the "standard range" set forth in the statute punishing the offense if he found any aggravat-

ing factors that justified such a departure; pursuant to this grant of authority, the judge had imposed a sentence of 90 months on the defendant. which exceeded the standard range of 49 to 53 months for his offense, second-degree kidnapping.

The Supreme Court had already held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi* v. *New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). In *Blakely* it let the other shoe drop and held over pointed dissents that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely* v. *Washington, supra*, at *4. "In other words, the *relevant* 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' and the judge exceeds his proper authority." *Id.* (citation omitted). "[W]ithout" is italicized in the original; we have italicized "relevant" to underscore the difference between the maximum sentence in the statute, and the maximum sentence—what the Supreme Court regards as the "relevant statutory maximum"—that the judge can impose without making his own findings, above and beyond what the jury found or the defendant admitted or, as here, did not contest.

The maximum sentence that the district judge could have imposed in this case (without an upward depar-

ture), had he not made any findings concerning quantity of drugs or obstruction of justice, would have been 262 months, given the defendant's base offense level of 32 U.S.S.G. § 2D1.1(c)(4) (32 is the base offense level when the defendant possessed at least 50 grams but less than 150 grams of crack), and the defendant's criminal history. U.S.S.G. §§ 4A1.1(a)-(e), 2(c)(1). True, that maximum is imposed not by the words of a federal statute, but by the sentencing guidelines. Provisions of the guidelines establish a "standard range" for possessing with intent to distribute at least 50 grams of cocaine base, and other provisions of the guidelines establish aggravating factors that if found by the judge jack up the range. The pattern is the same as that in the Washington statute, and it is hard to believe that the fact that the guidelines are promulgated by the U.S. Sentencing Commission rather than by a legislature can make a difference. The Commission is exercising power delegated to it by Congress, and if a legislature cannot evade what the Supreme Court deems the commands of the Constitution by a multistage sentencing scheme neither, it seems plain, can a regulatory agency. In its decision upholding the guidelines against delegation and separation of powers challenges, the Supreme Court had stated that "although Congress granted the Commission substantial discretion in formulating the guidelines, in actuality it legislated a full hierarchy of punishment—from near maximum imprisonment, to substantial imprisonment, to some imprisonment, to alternatives—and stipulated the most important offense and offender characteristics to place defendants within these categories" and that "in contrast to a court's exercising judicial power, the Commission is fully accountable to Congress, which can revoke or amend any or all of the Guidelines as it sees fit either

within the 180-day waiting period or at any time." *Mistretta v. United States*, 488 U.S. 361, 377, 393-94, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989) (citation omitted).

It would seem to follow, therefore, as the four dissenting Justices in *Blakely* warned, *Blakely* v. *Washington, supra*, at *16-17 (O'Connor, J., dissenting); *id.* at *29 (Breyer, J., dissenting); and several district judges have already ruled, e.g., *United States* v. *Croxford*, 2004 WL 1521560, at *7, *13 (D. Utah July, 7, 2004); *United States* v. *Medas*, 2004 WL 1498183, at *1 (E.D.N.Y. July 1, 2004); *United States* v. *Shamblin*, 2004 WL 1468561, at *8 (S.D. W. Va. June 30, 2004), that *Blakely* dooms the guidelines insofar as they require that sentences be based on facts found by a judge. The majority in *Blakely*, faced with dissenting opinions that as much as said that the decision doomed the federal sentencing guidelines, might have said, no it doesn't; it did not say that.

The qualification "based on facts found by a judge" is critical. Nothing in *Blakely* suggests that Congress cannot delegate to the Sentencing Commission the authority to decree that possession with intent to distribute 658.5 grams of cocaine base shall be punished by a sentence of at least 360 months though the statutory minimum is only 10 years. All it cannot do under *Blakely* is take away from the defendant the right to demand that the quantity be determined by the jury rather than by the judge, and on the basis of proof beyond a reasonable doubt. The government argues that all the guidelines do is regularize the discretion that judges would exercise in picking a sentence within a statutory range. *Mistretta* v. *United States, supra*, 488 U.S. at 395. If that were indeed all, that would be fine. And indeed to a great extent the system of the

guidelines, with its sentencing ranges and upward and downward departures, limits rather than extinguishes sentencing discretion. But the issue in *Blakely* was not sentencing discretion—it was the authority of the sentencing judge to find the facts that determine how that discretion shall be implemented and to do so on the basis of only the civil burden of proof. The vices of the guidelines are thus that they *require* the sentencing judge to make findings of fact (and to do so under the wrong standard of proof), e.g., 18 U.S.C. §§ 3553(a)(4), (5); 1B1.1, 3(a), 6A1.3(b); *Edwards* v. *United States*, 523 U.S. 511, 513-14, 118 S. Ct. 1475, 140 L. Ed. 2d 703 (1998); United *States* v. *Bequette*, 309 F.3d 448, 450-51 (7th Cir. 2002); *United States* v. *Jackson*, 300 F.3d 740, 749 (7th Cir. 2002); *United States* v. *Guzman*, 318 F.3d 1191, 1197-98 (10th Cir. 2003); *United States* v. *Lopez*, 219 F.3d 343, 348 (4th Cir. 2000), and that the judge's findings largely determine the sentence, given the limits on upward and downward departures, 18 U.S.C. §§ 3553(b), (e), (f); U.S.S.G. § 5K2.0; *Koon* v. *United States*, 518 U.S. 81, 92, 96, 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996); *United States* v. *Sherman*, 53 F.3d 782, 788-89 (7th Cir. 1995); *United States* v. *Lafayette*. 337 F.3d 1043, 1052 D.C. Cir. 2003); cf. *United States* v. *Cruz*, 317 F.3d 763, 766 (7th Cir. 2003). The finding of facts (other than the fact of the defendant's criminal history) bearing on the length of the sentence is just what the Supreme Court in *Blakely* has determined to be the province of the jury.

Of course, under almost any sentencing regime some residual discretion is vested in the sentencing judge; and to the extent that his exercise of discretion is influenced by the facts of the case, if only the facts that he may have glear ed concerning the defendant's char-

acter, remorse, health, and so on, judicial factfinding enters the sentencing process. But there is a difference between allowing a sentencing judge to consider a range of factors that may include facts that he informally finds—the pre-guidelines regime, under which "once it [was] determined that a sentence [was] within the limitations set forth in the statute under which it [was] imposed, appellate review [was] at an end," *Dorszynski* v. *United States*, 418 U.S. 424, 431, 94 S. Ct. 3042, 41 L. Ed. 2d 855 (1974), though sentences would occasionally be reversed because the district judge had relied on an impermissible consideration, e.g., United *States* v. *Maples*, 501 F.2d 985 (4th Cir. 1974), failed to exercise discretion, or based the sentence on false information, e.g., *Townsend* v. *Burke*, 334 U.S. 736, 741, 68 S. Ct. 1252, 92 L. Ed. 1690 (1948)—and commanding him to make factfindings and base the sentence (within a narrow band) on them. The latter is what Washington's sentencing guidelines did, and there is no basis for thinking that *Blakely* would have been decided differently had the identical guidelines been promulgated, with the identical effect on sentences, by the Washington Sentencing Commission. The Court in *Blakely* was well aware of the difference, stating that factfinding by judges and parole boards under indeterminate sentencing regimes are permissible because "the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned." *Blakely* v. *Washington*, *supra*, at *7 (emphasis in original).

It is tempting to think that maybe the guidelines can be saved by imagining the Sentencing Commission as a kind of superjudge who elaborates a code of sentencing

principles much as a thoughtful real judge, operating in a regime of indeterminate sentencing, might do informally in an effort to try to make his sentences consistent. But the same reasoning would if accepted have saved Washington's sentencing guidelines, unless an administrative agency is to be deemed a more responsible, a more authoritative, fount of criminal law than a legislature. The four dissenting Justices in *Blakely* were unable to identify a meaningful difference between the Washington sentencing guidelines and the federal sentencing guidelines. A fifth Justice—Justice Scalia, the author of the majority opinion in *Blakely*—had dissented in *Mistretta* on the ground that the federal sentencing guidelines were indeed laws, not judicial pronouncements. *Mistretta* v. *United States*, *supra*, 488 U.S. at 413-27. And Justice Scalia, now speaking for a majority of the Court, in *Blakely*, though he replied to the dissenting Justices at length, did not say that they were wrong to suggest that the federal sentencing guidelines could not be distinguished from the Washington sentencing guidelines. Instead he said: "By reversing the judgment below, we are not, as the State would have it, 'find [ing] determinate sentencing schemes unconstitutional.' This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment." *Blakely* v. *Washington*, *supra*, at *7. No distinction between the Washington statute and other schemes of determinate sentencing, such as the federal sentencing guidelines on which the dissenting Justices had dwelled at such length, is suggested.

As an original matter, then, we think that the guidelines, though only in cases such as the present one

in which they limit defendants' right to a jury and to the reasonable-doubt standard, and thus the right of defendant Booker to have a jury determine (using that standard) how much cocaine base he possessed and whether he obstructed justice, violate the Sixth Amendment as interpreted by *Blakely*. We cannot be certain of this. But we cannot avoid the duty to decide an issue squarely presented to us. If our decision is wrong, may the Supreme Court speedily reverse it.

We are mindful of the Supreme Court's ukase that the lower federal courts are not to overrule a Supreme Court decision even if it seems manifestly inconsistent with a subsequent decision, unless the subsequent decision explicitly overruled the earlier one. *State Oil Co.* v. *Khan*, 522 U.S. 3, 20, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997). The government argues that the guidelines were upheld against a Sixth Amendment challenge in *Edwards* v. *United States*, *supra*, 523 U.S. at 515, and if this is right we shall have to affirm Booker's sentence whatever our independent view of the guidelines' consistency with *Blakely*. (The government also mentions *United States* v. *Watts*, 519 U.S. 148, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997) (per curiam), a double-jeopardy case, and other Supreme Court decisions that rebuff various constitutional challenges to the guidelines—but not a Sixth Amendment challenge. Pre-*Blakely* decisions by lower federal courts rebuffing a Sixth Amendment challenge are of course no longer authoritative.) We do not think it is right. None of the opinions in *Blakely* cites *Edwards*. The majority opinion in *Blakely* states that "the Federal Guidelines are not before us, and we express no opinion on them," *Blakely* v. *Washington*, *supra*, at *6 n.9; it does not state that they were upheld against a Sixth Amendment challenge

in *Edwards* or any other case. (They were not, as we'll see.) When the Supreme Court says that it is not resolving an issue, it perforce confides the issue to the lower federal courts for the first pass at resolution.

The Court could have said in footnote 9 that the question whether to overrule *Edwards* was not before it. It did not say that. That is not surprising. The opinion in *Edwards* does not mention the Sixth Amendment or the constitutional right to a jury trial, and indeed states that "we need not, and we do not, consider the merits of petitioners' statutory and constitutional claims." 523 U.S. at 516. The Court did say that "petitioners' statutory and constitutional claims would make a difference if it were possible to argue, say, that the sentences imposed exceeded the maximum that the statutes permit for cocaine," *id.* at 515, which may mean that their constitutional claims (a mishmash of claims under different provisions of the Constitution, including however the Sixth Amendment) did not matter *because* the sentences did not exceed the statutory maximum. This was of course the understanding before *Blakely*, but *Blakely* redefined "statutory maximum." An assumption is not a holding.

The Court in *Edwards* was affirming a decision by this court, reported at 105 F.3d 1179 (7th Cir. 1997), which does not mention the Sixth Amendment or the constitutional right to a jury trial or any other constitutional issue. That would hardly have been oversight on the part of the opinion's author. The Supreme Court said that it was granting certiorari in *Edwards* to resolve a conflict over the question whether "the Sentencing Guidelines require the sentencing judge, not the jury, to determine both the kind and the amount of the drugs at issue in a drug conspiracy." 523 U.S. at

513. None of the other cases it cited for the existence of the conflict mentions the Constitution either. *United States* v. *Bounds*, 985 F.2d 188, 194-95 (5th Cir. 1993); *United States* v. *Pace*, 981 F.2d 1123, 1128-30 (10th Cir. 1992); *United States* v. *Owens*, 904 F.2d 411 (8th Cir. 1990).

And, finally, the petitioners in *Edwards* did not argue that the sentencing guidelines are unconstitutional. They did not say that the guidelines establish a sentencing structure that violates the Sixth Amendment. The most that can be dug out of their briefs, so far as bears on that issue, is that they were urging a statutory interpretation that would *avoid* a Sixth Amendment issue. The Court did not opine on the guidelines' consistency with the amendment because that consistency was not challenged. It did not rebuff a Sixth Amendment challenge to the guidelines because there was no Sixth Amendment challenge to the guidelines. We are obligated therefore to make our own constitutional determination.

We conclude that Booker has a right to have the jury determine the quantity of drugs he possessed and the facts underlying the determination that he obstructed justice. The judgment must therefore be reversed and the case remanded for resentencing. If the government does not object, the judge can simply sentence Booker to 262 months, since the choice of that sentence would not require any judicial factfinding. But if the government wants a higher sentence or unless, as explained below, the guidelines are not severable, then Booker, unless he strikes a deal with the government, will be entitled to a sentencing hearing at which a jury will have to find by proof beyond a reasonable doubt the facts on which a higher sentence would be premised.

There is no novelty in a separate jury trial with regard to the sentence, just as there is no novelty in a bifurcated jury trial, in which the jury first determines liability and then, if and only if it finds liability, determines damages. Separate hearings before a jury on the issue of sentence is the norm in capital cases.

Of course this will not work if the facts that the government would seek to establish in the sentencing hearing are elements of a statutory offense, for they would then have to be alleged in the indictment, and to re-indict at this stage would present a double-jeopardy issue. We can hardly attempt to resolve such issues on this appeal; the parties have not briefed or argued them. It would be doubly premature to address them, in light of the recent announcement by the Department of Justice that it believes that if *Blakely* is applicable to the guidelines, the "entire system" of the guidelines "must fall." "Departmental Legal Positions and Policies in Light of *Blakely v. Washington*," Memorandum to All Federal Prosecutors from James Comey, Deputy Attorney General of the United States, p. 3 (July 2, 2004). The Department may be right; the aspect of the guidelines that we believe to be unconstitutional, namely the requirement that the sentencing judge make certain findings that shall operate as the premise of the sentence and that he make them on the basis of the preponderance of the evidence, may not be severable from the substantive provisions of the guidelines. That is a question of legislative intent. *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191, 119 S. Ct. 1187, 143 L. Ed. 2d 270 (1999). The practical effect just of upping the burden of persuasion in sentencing hearings will be to reduce the average sentence, and Congress might prefer a return to

indeterminate sentencing (within the statutory ranges). In that event the guidelines would be invalid in their entirety, except, of course, as information that some judges would continue to give great weight to. But severability is another issue that has not been briefed or argued to us.

It might seem that if the substantive portions of the guidelines are not severable from the requirement that the judge find the facts relevant to the sentence, a 262-month sentence would be illegal. We do not think so. If the guidelines fall, the judge is free as he was before the guidelines were promulgated to fix any sentence within the statutory range, and the range for Booker, remember, is 10 years to life. Since the fall of the guidelines is a quite possible outcome, it would be prudent for the judge in any event to select a fall-back sentence.

To summarize: (1) The application of the guidelines in this case violated the Sixth Amendment as interpreted in *Blakely*; (2) in cases where there are no enhancements—that is, no factual findings by the judge increasing the sentence—there is no constitutional violation in applying the guidelines unless the guidelines are invalid in their entirety; (3) we do not decide the severability of the guidelines, and so that is an issue for consideration on remand should it be made an issue by the parties; (4) if the guidelines are severable, the judge can use a sentencing jury; if not, he can choose any sentence between 10 years and life and in making the latter determination he is free to draw on the guidelines for recommendations as he sees fit; (5) as a matter of prudence, the judge should in any event select a nonguidelines alternative sentence.

REVERSED AND REMANDED.

EASTERBROOK, Circuit Judge, dissenting.

My colleagues hold that, after *Blakely* v. *Washington*, No. 02-1632 (U.S. June 24, 2004), judicial application of the Sentencing Guidelines violates the defendant's right to trial by jury under the sixth amendment. I disagree with that holding on both procedural and substantive grounds. This is the wrong forum for such a conclusion; and whatever power we may possess should not be exercised to set at naught a central component of federal criminal practice.

Procedure first. The Supreme Court alone is entitled to declare one of its decisions defunct. Even if later decisions wash away the earlier one's foundation, still the power to administer the coup de grâce belongs to our superiors. See, e.g., *State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997); *Rodriguez de Quijas* v. *Shearson/American Experss, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989). The alternative is bedlam—which is the likely consequence of today's decision. A court of appeals cannot replace the Guidelines with something else; the list of non-exclusive options at the end of the majority's opinion is our home-brewed formula, and other courts are bound to favor different recipes as 900 district and circuit judges fumble for solutions. The Supreme Court alone can make a definitive judgment.

In order to reach the result they do, my colleagues must conclude that *Edwards* v. *United States*, 523 U.S. 511, 118 S. Ct. 1475, 140 L. Ed. 2d 703 (1998), was wrongly decided. Our portfolio as intermediate judges in a hierarchical system does not include the authority to make such declarations. True enough, *Edwards* does not contain the phrase "sixth amendment." But an argument based on the sixth amendment was made to

the Court: defendants insisted that, if the Guidelines and statutes were read as the United States and the Justices themselves did, that would deprive them of their right to a jury trial. The Court's opinion in *Edwards* acknowledged that constitutional contentions had been advanced. *Edwards* held that a judge nonetheless may ascertain (using the preponderance standard) the type and amount of drugs involved, and impose a sentence based on that conclusion, as long as the sentence does not exceed the statutory maximum. According to my colleagues: "This was of course the understanding before *Blakely*, but *Blakely* redefined 'statutory maximum.'" Slip op. 8. Maybe so, but *if* so it is just a reason why *Edwards* is on its last legs. It does not imply that we are entitled to put it in a coffin while it is still breathing.

Just as opera stars often go on singing after being shot, stabbed, or poisoned, so judicial opinions often survive what could be fatal blows. Think of *Lemon* v. *Kurtzman*, 411 U.S. 192, 93 S. Ct. 1463, 36 L. Ed. 2d 151 (1973), which is incompatible with later decisions, has been disparaged by most sitting Justices, yet has not been overruled. Closer to the mark *is Almendarez-Torres* v. *United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998), decided one month before *Edwards* and, like it, in tension with *Apprendi* v. *New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), on which *Blakely* rests. *Almendarez-Torres* holds that juries need not be asked to determine a defendant's criminal history even for purposes of recidivist statutes that use convictions to increase the maximum sentence. Four Justices, dissenting in *Almendarez-Torres*, made the arguments that were to carry the day two years later in *Apprendi*, when they

were joined by Justice Thomas, who had been in the *Almendarez-Torres* majority. See 523 U.S. at 248-71 (Scalia, J., joined by Stevens, Souter & Ginsburg, JJ ., dissenting). Justice Thomas wrote that he now considers *Almendarez-Torres* wrongly decided. *Apprendi*, 530 U.S. at 518-21 (Thomas, J., concurring). One might think *Almendarez-Torres* doomed, but it has not been overruled, and *Blakely* repeats a formula that carves out recidivist enhancements. We routinely apply *Almendarez-Torres*, saying that its fate rests with the Supreme Court alone. *Edwards* should receive the same treatment.

To support the view that *Edwards* no longer is authoritative, the majority notes that none of the opinions in *Blakely* cited it. Why would it pass without mention if it is a (logical) casualty of *Blakely?* Well, one reason could be that *Edwards* is *not* a logical casualty; that's the substantive question I discuss later. The other is that the question was left undecided. *Blakely* tells us: "The United States, as *amicus curiae*, urges us to affirm. It notes differences between Washington's sentencing regime and the Federal Sentencing Guidelines but questions whether those differences are constitutionally significant. See Brief for United States as *Amicus Curiae* 25-30. The Federal Guidelines are not before us, and we express no opinion on them." Slip op. 9 n.9. Having disclaimed views about the Guidelines, the Justices had no occasion to parse *Edwards*. I find it odd that my colleagues should focus on what the Court did *not* do (cite *Edwards*) while slighting what it *did* do (declare that analysis of the federal Guidelines is a different kettle of fish). What's more, although the Court did not attend to *Edwards* in *Blakely*, it did so in *Apprendi* itself, writing:

> The principal dissent . . . treats us to a lengthy disquisition on the benefits of determinate sentencing schemes, and the effect of today's decision on the federal Sentencing Guidelines. *Post*, at 544-552. The Guidelines are, of course, not before the Court. We therefore express no view on the subject beyond what this Court has already held. See, *e.g.*, *Edwards* v. *United States*, 523 U.S. 511, 515, 118 S. Ct. 1475, 140 L. Ed. 2d 703 (1998) (opinion of Breyer, J., for a unanimous court) (noting that "[o]f course, petitioners' statutory and constitutional claims would make a difference if it were possible to argue, say, that the sentences imposed exceeded the maximum that the statutes permit for a cocaine-only conspiracy. That is because a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines. [United States Sentencing Commission, Guidelines Manual § 5G1.1 (Nov.1994)]").

530 U.S. at 497 at 497 n.21. So the Justices see the links connecting the sixth amendment, *Apprendi*, *Edwards*, statutory maximums, and the federal Sentencing Guidelines. It is for them, not us, to say that as a result of *Blakely* this linkage scuttles *Edwards*. (Other casualties of the majority's approach are *United States* v. *Watts*, 519 U.S. 148, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997), which holds that a judge may increase a sentence based on relevant conduct of which the defendant had been acquitted by the jury, and *United States* v. *Dunnigan*, 507 U.S. 87, 113 S. Ct. 1111, 122 L. Ed. 2d 445 (1993), which holds that to decide whether the defendant receives a higher sentence for obstructing justice the judge may (indeed must) decide independently of the jury whether the defendant committed perjury at trial. See also *McMilllan* v. *Pennsylvania*,

477 U.S. 79, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986), which *Blakely* distinguished, but which on my colleagues' view is a dead letter.)

Now to substance. *Apprendi* establishes, 530 U.S. at 490 and *Blakely* reiterates, slip op. 5, this rule: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Shortly after *Apprendi* was released, we held that the "statutory maximum" means whatever statutory criteria make a person eligible for a given punishment. Consider 21 U.S.C. § 841, which establishes three maximums for cocaine-distribution offenses: distribution of any quantity permits a sentence up to 20 years (§ 841(b)(1)(C); distribution of more than 500 grams (or 5 grams of cocaine base) raises the maximum to 40 years (§ 841(b)(1)(B)(i), (iii), distribution of more than 5 kilograms (or 50 grams of cocaine base) raises the statutory maximum to life (§ 841(b)(1)(A)(i), (iii). In *United States* v. *Nance*, 236 F.3d 820, 824-25 (7th Cir. 2000), we held that the thresholds (500 grams and 5 kilograms) must be charged in the indictment and established beyond a reasonable doubt to the jury's satisfaction (if the defendant does not waive jury trial or admit the quantities). Otherwise the maximum is 20 years. Once the trier of fact has determined that the defendant distributed at least 500 grams or 5 kilograms, the sixth amendment has been satisfied and choosing a sentence below the statutory limit is for the judge alone, on the preponderance of the evidence. See, e.g., *Talbott* v. *Indiana*, 226 F.3d 866, 869-70 (7th Cir. 2000).

Blakely is the Supreme Court's analog to *Nance*. Just as § 841 provides a maximum of life imprisonment

for distributing cocaine only if the defendant distributed at least 5 kilograms (or 50 grams of cocaine base)—otherwise the maximum is 20 or 40 years—so Washington establishes a 10-year maximum sentence for second-degree kidnapping, but (according to a second statute) only if the defendant acted with "deliberate cruelty"—otherwise the maximum is 3 years. Washington contended that the relevant "statutory maximum" was 10 years; this is equivalent to arguing that the "statutory maximum" in *all* federal cocaine prosecutions is life. The Court disagreed and held that the relevant "statutory maximum" is the lowest of all arguably pertinent statutory caps, unless the jury makes the finding that raises the limit.

According to my colleagues, *Blakely* goes beyond what was necessary to decide the validity of Washington's system by giving this definition of "statutory maximum":

> In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," . . . and the judge exceeds his proper authority.

Slip op. 7 (emphasis in original). I do not see here the startling consequences my colleagues find. This says exactly what we held in *Nance:* one must start with the lowest statutory maximum and ask the jury to make findings that raise the sentence to which the defendant is exposed.

Blakely arose from a need to designate one of two statutes as the "statutory maximum". Washington called its statutes "sentencing guidelines," but names do not change facts. Nonetheless, the reading my colleagues give to this passage is that it does not matter whether the maximum is statutory; any legal rule, of any source (statute, regulation, guideline) that affects a sentence must go to a jury. Certainly *Blakely* does not hold that; it *could not* "hold" that given that it dealt with statutes exclusively. Attributing to *Blakely* the view that it does not matter whether a given rule appears in a statute makes hash of "statutory maximum." Why did the Justices deploy that phrase in *Apprendi* and repeat it in *Blakely* (and quite a few other decisions)? Just to get a chuckle at the expense of other judges who took them seriously and thought that "statutory maximum" might have something to do with statutes? Why write "statutory maximum" if you mean "all circumstances that go into ascertaining the proper sentence"?

Going *Blakely* one better, today's majority says that as a matter of constitutional law there *cannot* be any difference between statutes and other sources of rules: "it is hard to believe that the fact that the guidelines are promulgated by the U.S. Sentencing Commission rather than by a legislature can make a difference. The Commission is exercising power delegated to it by Congress, and if a legislature cannot evade what the Supreme Court deems the commands of the Constitution by a multistage sentencing scheme neither, it seems plain, can a regulatory agency." Slip op. 3-4. For the vital proposition that anything functionally equivalent to a statute (from the perspective of a criminal defendant) must be treated *as* a statute, the majority

cites—nothing. Phrases such as "it seems plain" are poor substitutes for authority in the Constitution's text or interpretive history.

The majority's proposition is refuted by *Blakely* itself, which tells us that legislatures *may* delegate such issues to the judiciary and parole boards without offending the sixth amendment. The Court considered whether there would be a constitutional problem with open-ended sentencing, such as a statute allowing any person convicted of burglary to be sentenced to any term of years up to 40. *Blakely*, slip op. 12-14. If the law left that decision to the judiciary, the court said, there would be no problem even if the sentencing judge applied (as a matter of common law) the rule "10 years unless the burglar uses a gun; if a gun, then 40 years." Put that algorithm in a statute and the sixth amendment commits to the jury the question whether the burglar was armed; put the same algorithm in a judicial opinion and the sixth amendment allows the judge to make the decision. The Court saw this not as an "evasion" but as a natural application of the Constitution.

"Statutory" in the phrase "statutory maximum" is not an inept short-hand. *Apprendi* and *Blakely* hold that the sixth amendment allocates to the jury all elements of the offense, plus all statutory details that are enough like elements that differences in phraseology should not be allowed to affect the defendant's rights. Example: the statutory quantity thresholds in § 841 are not "elements" of that offense, see *United States* v. *Bjorkman*, 270 F.3d 482 (7th Cir. 2001), because a low quantity does not lead to acquittal; distributing any detectable quantity is a criminal offense. But the statute works much as if Congress had enacted

multiple degrees of a crime. Just as the distinctions between manslaughter and first-degree murder (such as malice aforethought) must be proved to a jury's satisfaction, so the distinctions between simple and aggravated distribution must be shown. *Blakely* treated Washington has having established three degrees of kidnapping: the distinction between second- and third-degree kidnapping was deliberate cruelty. Having embedded this distinction in its statute books, the Court held, Washington could not cut the jury out of the process. This understanding of the sixth amendment has *nothing* to do with sentencing if there is only one degree of an offense (the Court's example of burglary with a 40-year maximum), or if the defendant has been convicted of the highest degree. Booker has been convicted of "cocaine distribution in the first degree" and the jury's verdict authorizes life imprisonment. What happens after that is unrelated to the sixth amendment. This is why the rule of *Apprendi* and *Blakely* is confined to statutes, why they do not affect statutory minimum sentences, see *Harris* v. *United States*, 536 U.S. 545, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002), why regulations and guidelines that affect sentencing after the "degree" of an offense has been fixed by the jury do not transgress the limits set by the sixth amendment, and why (capital punishment aside) *Apprendi* and *Blakely* are irrelevant if the jury's verdict authorizes life imprisonment. See *United States* v. *Smith*, 223 F.3d 554 (7th Cir. 2000).

Think of the indeterminate sentence: zero-to-life with release in the discretion of parole officials. The federal Parole Commission eventually developed a set of release guidelines designed to ensure consistent treatment of offenders. See *United States* v.

Addonizio, 442 U.S. 178, 99 S. Ct. 2235, 60 L. Ed. 2d 805 (1979). Parole-release guidelines might say something like: "Hold bank robbers in prison for 10 years; hold armed bank robbers for 20; hold armed bank robbers who discharge their weapons or take hostages for 30; add (or subtract) time from these presumptive numbers to reflect the size of the heist." If my colleagues are right, then such a system violates the sixth amendment. Yet the Justices do not think this a problem, as parole and other forms of executive clemency don't affect the degree of the offense and therefore do not undercut the jury's role. See *Blakely*, slip op. 13. If parole regulations are valid, why not the federal Sentencing Guidelines? How could commissioners, but not judges, be free to apply regulations that depend on how much cocaine the defendant distributed, or whether he pulled a gun on the teller? Once the jury has determined the degree (and the statutory consequences) of the offense, both judges and executive officials constitutionally may take part in determining how much of the statutory maximum the defendant serves in prison.

One other point about the federal sentencing guidelines: Given the matrix-like nature of the system and the possibility of departure, see 18 U.S.C. § 3553(b); U.S.S.G. § 5K2.0; *Koon* v. *United States*, 518 U.S. 81, 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996), the only finding that is *indispensable* to Booker's sentence is the one specified by statute: did he distribute more than 50 grams of cocaine base? The jury found beyond a reasonable doubt that he had. Where in the resulting statutory range of 10 years to life the actual sentence falls depends on complex interactions among drug quantity, gun use, violence, role in the offense (was defendant the mastermind or just a courier?), coopera-

tion, obstruction of justice, criminal history, and other factors, none of which is a sine qua non in the same sense as the statutory thresholds. See U.S.S.G. § 2D1.1 (21 pages long and just a starting point; later chapters provide many adjustments). No answer to the question "what was the total quantity?" gives any defendant a legal entitlement to a particular sentence. Lower quantities of drugs can be counterbalanced by a longer criminal history or a more senior role in the offense, or the judge may decide that upward departure is appropriate. Even if *Blakely*'s definition reaches regulations adopted by a body such as the Sentencing Commission, it requires an extra step (or three) to say that the jury must make the dozens of findings that matter to the Guidelines' operation in each case.

Apprendi and *Blakely* hold that the sixth amendment commits to juries all statutory sentencing thresholds. Perhaps the Court eventually will hold that some or all of the additional determinations that affect sentences under the federal Sentencing Guidelines also are the province of jurors. But *Blakely* does not take that step, nor does its intellectual framework support it—and *Edwards* holds that the current structure is valid provided that juries make all decisions that jack the maximum sentences. I would treat *Blakely* as holding that, when there are multiple statutory caps, the "statutory maximum" is the lowest one and the jury must determine whether statutory thresholds to increased ranges have been satisfied. To read more into *Blakely* is to attribute to that opinion something beyond its holding, and to overthrow the real holdings of other decisions.

Today's decision will discombobulate the whole criminal-law docket. I trust that our superiors will have something to say about this. Soon.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

No. 03-4225

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

FREDDIE J. BOOKER, DEFENDANT-APPELLANT

July 13, 2004

Appeal from the United States District Court for the
Western District of Wisconsin

ORDER

Before: HON. RICHARD A. POSNER, Circuit Judge; FRANK H. EASTERBROOK, Circuit Judge; HON. MICHAEL S. KANNE, Circuit Judge.

The Opinion issued July 9 is amended by adding the following sentence as a new, final paragraph of the opinion (just before "Reversed and Remand):

Because the government does not argue that Booker's Sixth Amendment challenge to the guidelines was forfeited by not being made in the district court,

we need not consider the application of the doctrine of plain error, e.g., *United States v. Olano*, 507 U.S. 725, 731 (1993), to challenges inspired by the Blakely decision.

APPENDIX C

UNITED STATES v. BOOKER

ORAL ARGUMENT, JULY 6, 2004

UNOFFICIALLY TRANSCRIBED FROM AUDIO RECORDING

This excerpt begins at approximately 19:41 into the argument, about midway through the government's argument:

MS. OLSON: If I could just quickly proceed to the government's second point. We believe that until the Supreme Court says otherwise, Blakely does not apply to the federal Guidelines. But we do want to say that in the event that lower courts disagree with that position, and hold that sentencing under the federal guidelines must comport with Blakely's procedural requirements, then the question is whether that's possible. And in some cases it will be

Q: Whether it's what?

MS. OLSON: Whether it's possible to sentence someone under the federal guidelines in a way that comports with Blakely. And in some cases that will be possible where, for example, the sentencing judge determines that there are no applicable guidelines provisions that would call for enhancements based on facts beyond those either admitted by the defendant or established in the jury verdict. And there are other cases, if the defendant waives

his right to be sentenced under Blakely or if on appeal any Blakely error doesn't

Q: What if the whole federal sentencing guidelines scheme [inaudible]

MS. OLSON: And that's the third possibility, your honor. That's the government's third point. If this court holds, or if any circuit court or district court concludes that sentencing under the federal guidelines must comport with Blakely, but the sentencing judge finds that there are in fact applicable sentencing provisions, guidelines provisions that would call for enhancements based on facts beyond those either established in the jury verdict or admitted by the defendant, then the government's position is that the guidelines as a whole may not be constitutionally applied. We believe that any attempt to overlay

Q: But really the judge could always treat the guidelines as recommendations, couldn't he? even if they were unconstitu . . . I mean the guidelines aren't going to be held unconstitutional. The question is whether the guidelines can require judges to impose sentences in particular cases.

MS. OLSON: Exactly, your honor. And in fact even if the guidelines as a whole cannot constitutionally be applied the result, we believe, would be that the judge would exercise traditional judicial discretion to impose a sentence, and in that case it would be the government's position in every case to urge the sentencing judge to draw from the guidelines, and to impose a sentence that would

comport with the sentence available under the guidelines.

Q: You wouldn't go back to the system as before the guidelines were implemented. That is, where the judge had virtual total discretion within the statutory maximum.

MS. OLSON: If the guidelines cannot constitutionally be applied, then we would . . . then the judge's discretion would be pre-guidelines discretion. But we believe that the sentencing commission over almost twenty years now of modification and tinkering and experimentation has in fact come up with a very valuable method of taking the factors that judges have traditionally used in sentencing, and determining how those should properly be weighed so that the result is in fact a sentence that is fair and appropriate

* * * * *

REBUTTAL ARGUMENT OF APPELLANT'S COUNSEL KELLY:

MR. KELLY: It's our position that Blakely doesn't require the sentencing guidelines to be found unconstitutional in their entirety. It merely requires that any fact which needs to be found in order to increase a sentence needs to be found by a jury or admitted by the defendant during his plea. [inaudible]

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

Case No. 03-CR-026-S

UNITED STATES OF AMERICA

v.

FREDDIE J. BOOKER, DEFENDANT

INDICTMENT

THE GRAND JURY CHARGES:

COUNT 1

On or about February 26, 2003, in the Western District of Wisconsin, the defendant,

FREDDIE JOE BOOKER,

knowingly and intentionally possessed with intent to distribute more than 50 grams of a mixture or substance containing cocaine base, a Schedule II controlled substance.

(In violation of Title 21, United States Code, Section 841(a)(1).)

COUNT 2

On or about February 26, 2003, in the Western District of Wisconsin, the defendant,

FREDDIE JOE BOOKER,

knowingly and intentionally distributed a mixture or substance containing cocaine base, a Schedule II controlled substance.

(In violation of Title 21, United States Code, Section 841(a)(1).)

A TRUE BILL

/s/ Signature illegible
PRESIDING JUROR

/s/ Signature illegible
J.B. Van Hollen
United States Attorney

Indictment returned: March 12, 2003

APPENDIX E

STATUTORY APPENDIX

1. The Due Process Clause of the United States Constitution, Amendment V, provides:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

2. The Jury Trial Clause of the United States Constitution, Amendment VI, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law * * *.

3. Section 3553 of Title 18 of the United States Code, titled "Imposition of a Sentence," provides, in relevant part, as follows:

> **(a) Factors to be considered in imposing a sentence.**—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.—

(1) In general.—Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.—

(A) Sentencing.—In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sen-

tence of the kind, and within the range, referred to in subsection (a)(4) unless—

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that—

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assis-

tance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) Statement of reasons for imposing a sentence.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

* * * * *

4. Section 3742 of Title 18 United States Code, titled "Review of a sentence," provides as follows:

(a) Appeal by a defendant.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) Appeal by the Government.—The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

(c) Plea agreements.—In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure—

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(d) Record on review.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) Consideration.—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that—

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

(f) Decision and disposition.—If the court of appeals determines that—

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) Sentencing upon remand.—A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals, except that—

(1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date; and

(2) The court shall not impose a sentence outside the applicable guidelines range except upon a ground that—

(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

(h) Application to a sentence by a magistrate judge.—An appeal of an otherwise final sentence imposed by a United States magistrate judge may be taken to a judge of the district court, and this section shall apply (except for the requirement of approval by the Attorney General or the Solicitor General in the case of a Government appeal) as though the appeal were to a court of appeals from a sentence imposed by a district court.

(i) Guideline not expressed as a range.—For the purpose of this section, the term "guideline range" includes a guideline range having the same upper and lower limits.

(j) Definitions.—For purposes of this section—

(1) a factor is a "permissible" ground of departure if it—

(A) advances the objectives set forth in section 3553(a)(2); and

(B) is authorized under section 3553(b); and

(C) is justified by the facts of the case; and

(2) a factor is an "impermissible" ground of departure if it is not a permissible factor within the meaning of subsection (j)(1).

5. Section 841(a) and (b) of Title 21 of the United States Code, titled "Prohibited Acts A," provides, in relevant part, as follows:

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

* * * * *

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of

imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

* * * * *

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment

which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

* * * * *

6. Section 991 of Title 28 of the United States Code, titled "United States Sentencing Commission; establishment and purposes," provides, in relevant part, as follows:

* * * * *

(b) The purposes of the United States Sentencing Commission are to—

(1) establish sentencing policies and practices for the Federal criminal justice system that—

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

* * * * *

7. Section 994 of Title 28 of the United States Code, titled "Duties of the Commission," provides, in relevant part, as follows:

(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of any Federal statute shall promulgate and distribute to all courts of the United States and to the United States Probation System—

(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including—

(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term;

(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively; and

(E) a determination under paragraphs (6) and (11) of section 3563(b) of title 18;

* * * * *

(b)(1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

(2) If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not

exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.

8. United States Sentencing Guidelines § 1B1.1, titled "Application Instructions," provides, in relevant part, as follows:

Except as specifically directed, the provisions of this manual are to be applied in the following order:

(a) Determine, pursuant to § 1B1.2 (Applicable Guidelines), the offense guideline section from Chapter Two (Offense Conduct) applicable to the offense of conviction. See § 1B1.2.

(b) Determine the base offense level and apply any appropriate specific offense characteristics, cross references, and special instructions contained in the particular guideline in Chapter Two in the order listed.

(c) Apply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.

(d) If there are multiple counts of conviction, repeat steps (a) through (c) for each count. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly.

(e) Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three.

(f) Determine the defendant's criminal history category as specified in Part A of Chapter Four.

Determine from Part B of Chapter Four any other applicable adjustments.

(g) Determine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above.

(h) For the particular guideline range, determine from Parts B through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.

(i) Refer to Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and to any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence.

* * * * *

9. United States Sentencing Guidelines § 1B1.3, titled "Relevant Conduct (Factors that Determine Guideline Range)," provides, in relevant part, as follows:

(a) *Chapters Two (Offense Conduct) and Three (Adjustments).* Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

(b) *Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence).* Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

* * * * *

10. United States Sentencing Guidelines § 2D1.1, titled "Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy," provides, in relevant part, as follows:

(a) Base Offense Level (Apply the greatest):

(1) 43, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(2) 38, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if the defendant receives an adjustment under §3B1.2 (Mitigating Role), the base offense level under this subsection shall be not more than level 30.

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

(2) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.

(3) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by 2 levels.

(4) If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under § 3B1.2 (Mitigating Role), increase by 2 levels.

(5) (Apply the greater):

(A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.

(B) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to (I) human life other than a life described in subdivision (C); or (II) the environment, increase by 3 levels. If the resulting offense level is less than level 27, increase to level 27.

(C) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by 6 levels. If the resulting offense level is less than level 30, increase to level 30.

(6) If the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels.

[Subsection (c) (Drug Quantity Table) is set forth on the following pages.]

* * * * *

(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*	Base Offense Level
(1) •30 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates); •150 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •1.5 KG or more of Cocaine Base;	Level 38
* * * * *	
(2) •At least 10 KG but less than 30 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 50 KG but less than 150 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	Level 36

	•At least 500 G but less than 1.5 KG of Cocaine Base;	
	* * * * *	
(3)	•At least 3 KG but less than 10 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 15 KG but less than 50 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •At least 150 G but less than 500 G of Cocaine Base;	Level 34
	* * * * *	
(4)	•At least 1 KG but less than 3 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 5 KG but less than 15 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •At least 50 G but less than 150 G of Cocaine Base;	Level 32
	* * * * *	
(5)	•At least 700 G but less than 1 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 3.5 KG but less than 5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •At least 35 G but less than 50 G of Cocaine Base;	Level 30

* * * * *

(6)	•At least 400 G but less than 700 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 2 KG but less than 3.5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •At least 20 G but less than 35 G of Cocaine Base;	Level 28

* * * * *

(7)	•At least 100 G but less than 400 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 500 G but less than 2 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •At least 5 G but less than 20 G of Cocaine Base;	Level 26

* * * * *

(8)	•At least 80 G but less than 100 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 400 G but less than 500 G of Cocaine (or the equivalent a mount of other Schedule I or II Stimulants); •At least 4 G but less than 5 G of Cocaine Base;	Level 24

* * * * *

(9)	•At least 60 G but less than 80 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 300 G but less than 400 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •At least 3 G but less than 4 G of Cocaine Base;	Level 22

* * * * *

(10)	•At least 40 G but less than 60 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 200 G but less 300 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •At least 2 G but less than 3 G of Cocaine Base;	Level 20

* * * * *

(11)	•At least 20 G but less than 40 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 100 G but less than 200 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •At least 1 G but less than 2 G of Cocaine Base;	Level 18

* * * * *

(12)	•At least 10 G but less than 20 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 50 G but less than 100 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •At least 500 MG but less than 1 G of Cocaine Base;	Level 16

* * * * *

(13)	•At least 5 G but less than 10 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 25 G but less than 50 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	Level 14

•At least 250 MG but less than 500 MG of Cocaine Base;

* * * * *

(14)	•Less than 5 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); •Less than 25 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •Less than 250 MG of Cocaine Base;	Level 12

* * * * *

* Notes to Drug Quantity Table:

(A) Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level.

* * * * *

(D) "Cocaine base," for the purposes of this guideline, means "crack." "Crack" is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.

* * * * *

(F) In the case of Schedule I or II Depressants, Schedule III substances (except anabolic steroids),

Schedule IV substances, and Schedule V substances, one "unit" means one pill, capsule, or tablet. If the substance is in liquid form, one "unit" means 0.5 gm.

* * * * *

11. United States Sentencing Guidelines § 3B1.1 titled "Aggravating Role," provides, in relevant part, as follows:

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

* * * * *

12. United States Sentencing Guidelines § 3C1.1 titled "Obstructing or Impeding the Administration of Justice," provides, in relevant part, as follows:

If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the

instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

* * * * *

13. United States Sentencing Guidelines § 6A1.3 titled "Resolution of Disputed Factors (Policy Statement," provides as follows:

(a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

(b) The court shall resolve disputed sentencing factors at a sentencing hearing in accordance with Rule 32(c)(1), Fed. R. Crim. P.

Commentary

In pre-guidelines practice, factors relevant to sentencing were often determined in an informal fashion. The informality was to some extent explained by the fact that particular offense and offender characteristics rarely had a highly specific or required sentencing consequence. This situation no longer exists under sentencing guidelines. The court's resolution of disputed sentencing factors usually has a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair.

Although lengthy sentencing hearings seldom should be necessary, disputes about sentencing factors must be resolved with care. When a dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. See, e.g., United States v. Ibanez, 924 F.2d 427 (2d Cir. 1991). An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues. See, e.g., United States v. Jimenez Martinez, 83 F.3d 488, 494-95 (1st Cir. 1996) (finding error in district court's denial of defendant's motion for evidentiary hearing given questionable reliability of affidavit on which the district court relied at sentencing); United States v. Roberts, 14 F.3d 502, 521(10th Cir. 1993) (remanding because district court did not hold evidentiary hearing to address defendants' objections to drug quantity determination or make requisite findings

of fact regarding drug quantity); see also, United States v. Fatico, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979), cert. denied, 444 U.S. 1073 (1980). The sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law.

In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. See 18 U.S.C. § 3661; see also United States v. Watts, 117 S. Ct. 633, 635 (1997) (holding that lower evidentiary standard at sentencing permits sentencing court's consideration of acquitted conduct); Witte v. United States, 515 U.S. 389, 399-401 (1995) (noting that sentencing courts have traditionally considered wide range of information without the procedural protections of a criminal trial, including information concerning criminal conduct that may be the subject of a subsequent prosecution); Nichols v. United States, 511 U.S. 738, 747-48 (1994) (noting that district courts have traditionally considered defendant's prior criminal conduct even when the conduct did not result in a conviction). Any information may be considered, so long as it has sufficient indicia of reliability to support its probable accuracy. Watts, 117 S. Ct. at 637; Nichols , 511 U.S. at 748; United States v. Zuleta-Alvarez, 922 F.2d 33 (1st Cir. 1990), cert. denied, 500 U.S. 927 (1991; United States v. Beaulieu, 893 F.2d 1177 (10th Cir.), cert. denied, 497 U.S. 1038 (1990). Reliable hearsay evidence may be considered. United States v. Petty, 982 F.2d 1365 (9th Cir. 1993), cert. denied, 510 U.S. 1040 (1994); United States v. Sciarrino, 884 F.2d 95 (3d Cir.),

cert. denied, 493 U.S. 997 (1989). Out-of-court declarations by an unidentified informant may be considered where there is good cause for the nondisclosure of the informant's identity and there is sufficient corroboration by other means. United States v. Rogers, 1 F.3d 341 (5th Cir. 1993); see also United States v. Young, 981 F.2d 180 (5th Cir.), cert. denied, 508 U.S. 980 (1993); United States v. Fatico, 579 F.2d 707, 713 (2d Cir. 1978), cert. denied, 444 U.S. 1073 (1980). Unreliable allegations shall not be considered. United States v. Ortiz, 993 F.2d 204 (10th Cir. 1993).

The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.

Supreme Court, U.S.
FILED
JUL 28 2004
OFFICE OF THE CLERK

(6)

No. 04-104

In the
Supreme Court of the United States
October Term, 2004

UNITED STATES OF AMERICA,
Petitioner,

v.

FREDDIE J. BOOKER,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT FREDDIE J. BOOKER'S BRIEF IN RESPONSE

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QUESTIONS PRESENTED

1. Whether a district court violates the Fifth and Sixth Amendments by relying upon facts that increase the maximum sentence available under the United States Sentencing Guidelines (other than the fact of a prior conviction) when those facts are not charged in the indictment and either found by the jury on proof beyond a reasonable doubt or admitted by the defendant.

2. If the answer to the first question is "yes," the following question is presented: What role do the Sentencing Reform Act, the Sentencing Guidelines, and Federal Rule of Criminal Procedure 32 continue to play in federal criminal sentencing?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
ARGUMENT	2
A. The Questions Presented Merit Supreme Court Resolution .	3
B. Respondent's Case Is An Adequate Vehicle For Addressing The First Question But Not The Second	5
C. The Court Should Exercise Caution In Deciding Whether And How Federal Judges Should Continue To Use The Sentencing Guidelines	8
D. If The Court Accepts Review Of This Case, It Should Decide How To Remedy The Violation Of Respondent's Constitutional Rights On Remand	12
E. If The Petition Is Accepted, Briefing Should Not Be Expedited.	16
CONCLUSION	16

TABLE OF AUTHORITIES

Apprendi v. New Jersey, 530 U.S. 466 (2000)	15
Blakely v. Washington, 124 S.Ct. 2531 (2004)	2,3,6,7 9-11 14-16
Regan v. Time, Inc., 468 U.S. 641 (1984)	11
Ring v. Arizona, 536 U.S. 584 (2002)	15
United States v. Ameline, 2004 WL 1635808 (9th Cir. July 21, 2004)	4
United States v. Booker, 2004 WL 1535858 (7th Cir. July 9, 2004)	3-5,7 11,13 15
United States v. Jackson, 390 U.S. 570 (1968)	13,14
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United States v. Pineiro, 2004 WL 1543170 (5th Cir. July 12, 2004) 4

OTHER AUTHORITIES

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18 U.S.C. § 3553(b) 10

18 U.S.C. § 3593(b),(e) 13

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Fed. R. Civ. P. 42(b) 13

Fed. R. Crim. P. 32(i)(3) 11

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Atty. Gen., Re: Departmental Legal Positions and Policies in Light of *Blakely v. Washington* (July 2, 2004) (http://sentencing.typepad.com/sentencing_law_and_policy/files/dag_blakely_memo-7204.pdf) .....

Sentencing Reform Act, Publ. L. No. 98-473, 98 Stat. 1837 (1987) 10

U.S.S.G. § 1B1.3 2

U.S.S.G. § 2D1.1(c)(2) 2,5

U.S.S.G. § 3C1.1 2,6

No. 04-104

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
PETITIONER,

v.

FREDDIE J. BOOKER,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN RESPONSE

The respondent, by his counsel of record, makes the following response to the petition for a writ of certiorari.

STATEMENT OF THE CASE

The respondent was indicted for two drug crimes, both occurring on February 26, 2003. One involved the sale of a small amount of cocaine base to a friend. The other involved his possession with intent to sell at least 50 grams of cocaine base. Record 2.

During trial, a police detective testified that respondent had admitted selling 20 ounces of

cocaine base between November 2002 and February 2003 at various locations in Wisconsin. Record 64: 37-42. Respondent testified that he did not sell 20 ounces of cocaine base and that the statement was filled with lies. Record 64: 103-04, 121. The police found no evidence to corroborate the allegation that Booker sold 20 ounces of cocaine base prior to the offense of conviction. Record 64: 52-53.

The jury found the respondent guilty of the two crimes that occurred on February 26, 2003. At sentencing, the judge found that those two crimes involved 92.5 ounces of cocaine base. He added 20 ounces (or 567 grams) to the actual amounts at issue in the two counts pursuant to U.S.S.G. § 1B1.3 (relevant conduct), to arrive at an offense level of 36. U.S.S.G. § 2D1.1(c)(2). He added another two levels pursuant to U.S.S.G. § 3C1.1 after finding that respondent obstructed justice by committing perjury during his trial. The resulting Guideline range, when combined with respondent's criminal history score, was 360 months to life. Booker was sentenced to 360 months in prison. Record 66: 9. Without the additional 20 ounces of cocaine base and the enhancement for obstructing justice, the respondent's maximum guideline sentence would have been 262 months. Booker Supp. C.A. Br. 1.

ARGUMENT

The impact of *Blakely* upon federal sentencing practices is an important question that deserves Supreme Court resolution. However, important questions merit deliberate process and unhurried attention. No crisis is

afoot that requires the Court to depart from procedures it has crafted to assure that issues are carefully and fully briefed and argued. *See* Response to Motion to Expedite Schedule for Briefing and Argument if Certiorari Is Granted, filed contemporaneously with this brief.

The government asks the Court to decide a severability question that the Seventh Circuit did not resolve in *Booker*. Obvious flaws in the government's reasoning would have been exposed at an earlier stage if the severability issue had been briefed in the Seventh Circuit. While the respondent's case is appropriate for Supreme Court review, so are others and it would be prudent for the Court to review decisions that have more fully developed this complex issue. If the Court chooses to accept respondent's case for review, it also should accept cases in which appellate courts have more carefully considered the questions left unanswered by the Seventh Circuit. Alternatively, the Court could hold respondent's case until it resolves the questions upon review of a more suitable decision and decide respondent's case thereafter in summary fashion.

A. The Questions Presented Merit Supreme Court Resolution

There is a growing consensus among courts and commentators that *Blakely v. Washington*, 124 S.Ct. 2531 (2004), compels the conclusion that federal judges violate the Sixth Amendment by finding facts that permit a longer sentence than the United States Sentencing Guidelines would authorize solely on the basis of the facts found by a jury or

admitted in a guilty plea. *See* Hon. Paul Cassell testimony before the United States Senate Committee on the Judiciary (July 13, 2004) (collecting cases) (available at http://judiciary.senate.gov/testimony.cfm?id=1260&wit_id=3669); Stephanos Bibas, *Blakely's Federal Aftermath,* 16 Fed. Sentencing Rep. at 4 (forthcoming 2004) ("No commentator who has considered the issue agrees with the Department of Justice's position.") (available at http://sentencing.typepad.com/sentencing_law_and_policy/files/bibas_blakelys_federal_aftermath.pdf).

There is nonetheless a division of opinion among the appellate courts as to that threshold issue. *Compare United States v. Booker,* 2004 WL 1535858 (7th Cir. July 9, 2004) (judicial fact-finding that increased the maximum guideline sentence violated the Sixth Amendment), and *United States v. Ameline,* 2004 WL 1635808 (9th Cir. July 21, 2004) (same), *with United States v. Pineiro,* 2004 WL 1543170 (5th Cir. July 12, 2004) (*Blakely* has no impact on the federal sentencing guidelines). The Supreme Court should resolve that conflict to assure the uniform administration of federal sentences.

The circumstances under which judges should continue to rely upon or consider the Sentencing Guidelines, if at all, present a complex issue. The Seventh Circuit did not address the issue in respondent's case. *See Booker,* 2004 WL 1535858 at *5-6 (remanding for resolution in district court). The two circuit courts that have addressed the question are in conflict. *Compare Ameline,* 2004 WL 1635808 at *11 (procedural requirement that judge act as fact-finder can be severed from substantive provisions of

Guidelines) *with United States v. Mooney,* 2004 WL 1636960, *13 (8th Cir. July 23, 2003) ("the Guidelines ... cannot be severed into constitutional and unconstitutional parts ...."). At an appropriate time and with an appropriate case, the Court should resolve that conflict to bring uniformity to federal sentencing practices.

B. Respondent's case is an adequate vehicle for addressing the first question but not the second

1. The *Booker* decision squarely addressed the constitutionality of sentencing enhancements that the Guidelines compel on the basis of facts that a judge finds by a preponderance of the evidence. The respondent was convicted of two discrete crimes committed on the same day: delivering a small amount of cocaine base to another man, and possessing with the intent to distribute more than 50 grams of cocaine base. Had he been sentenced on the basis of those facts alone, the maximum sentence authorized by the Guidelines would have been 262 months. At sentencing, over the respondent's objection that the evidence supporting the finding was unreliable, and despite the respondent's denial, the judge found that the respondent had distributed an additional 20 ounces of cocaine base during the weeks prior to the crimes of conviction. That finding raised the respondent's offense level from 32 (applicable to 50 grams) to 36 (applicable to 500 grams). U.S.S.G. § 2D1.1. In addition, the judge found that the respondent obstructed justice by committing perjury during his trial. That finding

increased the offense level to 38. U.S.S.G. § 3C1.1. The enhanced offense level subjected respondent to a maximum guideline sentence of life imprisonment. Although the judge sentenced the respondent at the low end of the enhanced guideline range, the 30 year sentence was 98 months longer than the Guidelines would have authorized in the absence of the facts that the judge found at sentencing—facts that were neither admitted by the respondent nor found by the jury.

The key issue that *Blakely* resolved—whether judges may find facts that are legally essential to the punishment imposed—is framed in respondent's case. Bound by the Sentencing Guidelines, the maximum sentence that the judge was authorized to impose upon the respondent "solely on the basis of facts reflected in the jury verdict or admitted by the defendant," *Blakely*, 124 S.Ct. at 2537, was 262 months. By making "additional findings," the judge imposed an additional 98 months of punishment "that the jury's verdict alone [did] not allow," *id.*, and therefore exceeded his authority by infringing upon the respondent's right to have a jury find those facts beyond a reasonable doubt.

2. The more subtle and complicated issue concerns the remedy for this constitutional violation. The Seventh Circuit concluded that the respondent should be resentenced but did not decide what should happen at his new sentencing hearing. The options left open included the imposition of a sentence without regard to the Guidelines, the imposition of a Guideline sentence on the basis of the facts found by the jury, or the empanelling of a new

jury to find sentencing facts. Because none of these options were briefed and argued,[1] the court did not consider them. *Booker*, 2004 WL 1535858 at *5-6.

The Supreme Court would benefit by reviewing an appellate opinion that more fully develops these questions. The argument against severability that the government hopes to advance in this case was first presented to the court of appeals during oral argument. Pet. at 4 n.1. It is ordinarily unwise for the Supreme Court to consider an issue in the first instance that was not briefed or ruled upon in the lower courts. As Judge Gertner recently observed, the law is best developed through an ongoing dialog between the lower courts and appellate courts. *United States v. Mueffleman*, No. 01-CR-10387-NG, slip op. at 17-18 (D. Mass. July 26, 2004) (available at http://sentencing.typepad.com/sentencing_law_and_policy/files/gertner_blakely_decision.pdf). That dialog is absent in respondent's case, making it less suitable than others for the resolution of this vital issue.

The respondent suggests that, if the Court grants the petition, it consider respondent's case together with one or more additional cases in which appellate courts have more fully considered and developed this issue. It

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[1] As the petition notes, the Seventh Circuit ordered briefs addressing *Blakely* to be filed two days after granting a motion for supplemental briefing, heard argument four days after that, and issued its opinion three days after the argument. Pet. at 3-4. The abbreviated schedule left little time for thorough consideration of the issues.

should not take long for an appropriate case to reach the Court, if one has not done so already. In the alternative, after accepting a fitting case, the Court could hold respondent's case and later resolve it summarily. As the respondent argued in his response to the petitioner's motion to expedite, there is no need for blinding speed in a rush to confront these issues.

C. The Court should exercise caution in deciding whether and how federal judges should continue to use the sentencing guidelines

Excessive speed can be as dangerous in the courts as it is on the highways. A reckless race to the finish line is more likely to result in casualties than justice.

The government's position on severability is inconsistent, and that inconsistency may be the product of the haste with which the government has analyzed a complex issue. The government asks whether "in a case in which the guidelines would require the court to find a sentence-enhancing fact, the Sentencing Guidelines as a whole would be inapplicable, as a matter of severability analysis ...." Pet. at I. The framing of the question ignores the larger issues at stake.

1. The question implies that the Guidelines will continue to apply so long as the sentencing judge is not required to find any facts that were not admitted in a guilty plea or determined by a jury. When the government seeks to prove additional facts to enhance a sentence, the government contends that the Guidelines do not apply, and that judges are free to give any sentence they wish between

the statutory minimum and maximum. The government staked out this position soon after *Blakely* was decided. Dep. Att'y Gen. James Comey Memorandum to All Federal Prosecutors Re: Departmental Legal Positions and Policies in Light of *Blakely v. Washington* at 2 (July 2, 2004) ("Comey Memorandum") (available at http://sentencing.typepad.com/sentencing_law_and_policy/files/dag_blakely_memo_7204.pdf)

The government's reasoning is flawed. If the Guidelines are unconstitutional in their entirety, they cannot be resurrected in some cases and ignored in others. Congress could not have intended courts to use two sentencing schemes: one that is bound by the Guidelines and one that is not. "The suggestion that courts use the Guidelines in some cases but not in others is at best schizophrenic and at worst contrary to basic principles of justice, practicality, fairness, due process, and equal protection." *United States v. King*, No. 6:04-CR-35-Orl-31KRS, slip op. at 14 (M.D. Fla. July 19, 2004) (available at http://sentencing.typepad.com/sentencing_law_and_policy/files/us_v.%20King.pdf) The government's breakdown in logic—if the constitutional problem that makes the Guidelines infirm cannot be severed, how can the Guidelines be used at all?—may be the product of analyzing an issue with haste instead of calm reflection. The Court should not repeat that error by forcing the hurried confrontation of these difficult issues.

2. The government also suggests that, even if the Guidelines cannot be constitutionally applied, judges should continue to give them "due regard." Pet. at 17. It seems, then, that the government

believes severability is possible. Federal law requires judges to "consider" the Guidelines, among other factors, when imposing a sentence. 18 U.S.C. § 3553(a)(4). The same law requires judges to follow the Guidelines in all but exceptional cases. 18 U.S.C. § 3553(b). The government wants to leave subsection (a) intact (the statutory authority for considering the Guidelines) while relieving judges of their obligation under subsection (b) to follow the Guidelines. The government does not explain how its position is anything other than an argument for severability. Again, the government's position is probably confused because it was formulated in haste.

3. The government is also unclear in defining the scope of the legislation and rules that are nullified if judicial fact-finding cannot be severed from the balance of federal sentencing law. The Guidelines are a creature of the Sentencing Reform Act ("SRA"), Pub. L. No. 98-473, 98 Stat. 1837 (1987). If, as the government suggests, judicial fact-finding is an essential component of the SRA, is the SRA unconstitutional in its entirety? The government does not consider the consequences of that position: a return to truly indeterminate sentencing, with a parole board deciding when the sentence imposed by the court should be deemed completed; an end to the United States Sentencing Commission and to supervised release; the undoing of the SRA's extensive changes to sentencing options, including fines and probation; and a return to relative unreviewability of sentences on appeal. None of these features of the SRA are affected by *Blakely*, and there is no reason to believe that Congress would not have enacted the Act even

if its desire to have judges determine facts that increase sentences could not be achieved. If *Blakely* is applied to the Guidelines, a determinate sentencing scheme remains. Uniformity will not be lost by changing the fact-finder and the burden of proof. The SRA will continue to serve Congress' principal objectives.

The government fails to address severability at the legislative level, but since severability is a question of legislative intent, *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984), that is where the analysis should focus. In its rush to bring a case before the Court, the government does not explain why the logical extension of its position would not effectively nullify the SRA.

4. A more calm and considered view leads to the conclusion that those few provisions of federal law that require courts to find sentence-enhancing facts (most prominently, Fed. R. Crim. P. 32(i)(3)) can be severed from the balance of federal sentencing law without doing violence to Congress' intent. The primary goal of the SRA was to eliminate disparity in sentences. 28 U.S.C. § 991(b)(1)(B). The identity of the fact-finder (judge or jury) has no bearing on the attainability of that goal. Since "much of what Congress was trying to accomplish in the Sentencing Reform Act of 1984 is untouched by *Blakely*," King & Klein, *Beyond Blakely*, 16 Fed. Sent. Rep. ___ at *5 (forthcoming 2004) (available at http://www.ussguide.com/members/BulletinBoard/Blakely/King-Klein.pdf), there is good reason to believe that Congress would have enacted the SRA even if some procedural modifications in the scheme are required to substitute a jury for judge as

fact-finder. In any event, the ramifications of the severability question require cautious consideration that is incompatible with the rush to a decision that the government advocates.

D. If the Court Accepts Review of this Case, It Should Decide How to Remedy the Violation of Respondent's Constitutional Rights on Remand

An equally compelling issue arises in this case if the Court agrees that respondent's Fifth and Sixth Amendment rights were violated and if it finds that sentencing courts should continue to use the Guidelines, substituting a jury for the judge as fact-finder. Anticipating the possibility that the Guidelines will continue to rule the world of federal sentencing, the Seventh Circuit held that respondent was "entitled to a sentencing hearing at which a jury will have to find by proof beyond a reasonable doubt the facts on which a higher sentence would be premised." *Booker*, 2004 WL 1535858 at *5. In the event that the Court grants the petition and affirms the court of appeals' determination that respondent's sentence violated his Fifth and Sixth Amendment rights, and if requiring facts to be found by a jury instead of a judge does not invalidate the Guidelines (and perhaps the Sentencing Reform Act) in their entirety, the Court should decide how the sentencing judge should proceed when respondent returns for a new sentence.

1. Although the court of appeals found no "novelty" in the concept of "a separate jury trial with regard to the sentence," *id.*, it cited

no authority for holding a second trial in front of a second jury to decide facts that were never charged in the indictment and that expose the respondent to greater punishment than he faced at the end of the first trial. Sentencing hearings before a jury are the norm in federal capital cases because Congress requires a jury to decide whether a defendant should die. 18 U.S.C. § 3593(b), (e). In respondent's noncapital case, Congress has not authorized a sentencing procedure that permits a jury to determine "sentencing facts" after jury has determined the defendant's guilt.[2] The absence of Congressional authorization is fatal to the holding that a sentencing jury can be convened to decide the facts that will determine respondent's guideline range.

In *United States v. Jackson*, 390 U.S. 570, 576-77 (1968), this Court rejected the government's contention that a federal court is authorized to use "a procedure unique in the federal system—that of convening a special jury, without the defendant's consent, for the sole purpose of deciding" whether a particular sentence should be imposed. Finding no evidence "that Congress contemplated any

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[2] *Booker*, 2004 WL 1535858 at *5, also notes that bifurcated jury trials occur in civil cases, with the jury first determining liability and then ruling on damages. Separate trials of issues in a civil case are specifically authorized by Fed. R. Civ. P. 42(b). There is no comparable authority to order a jury to hear sentencing evidence in a federal criminal prosecution that does not seek a death penalty.

such scheme," the Court rejected the view that Congress had authorized "a separate sentencing proceeding before a penalty jury." *Jackson*, 390 U.S. at 578.

Jackson's rejection of a sentencing procedure not authorized by Congress precludes the use of a sentencing jury in respondent's case. The empanelling of a sentencing jury after guilt has already been determined would represent a startling change in criminal procedure. *Jackson* recognized that any such change must be devised by Congress, not the courts:

> It is one thing to fill a minor gap in a statute—to extrapolate from its general design details that were inadvertently omitted. It is quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality.

Id. at 580. The constitutional infirmity of the sentencing guidelines cannot be rescued by creating a sentencing procedure that Congress has not authorized. If the Court reaches the issue, it should decide whether criminal defendants who must be resentenced on *Blakely* grounds can be subjected to another jury trial at sentencing in the absence of Congressional authorization.

2. The Seventh Circuit's endorsement of sentencing juries raises constitutional concerns. The distinction between elements of an offense and sentencing facts, long elusive

and increasingly artificial, may have finally disappeared. *Blakely* notes that a tenet of common-law criminal jurisprudence requires "every fact which is legally essential to the punishment" to be charged in the indictment. 1 J. Bishop, Criminal Procedure, § 87, p. 55 (2d ed. 1872), *cited in Blakely*, 124 S.Ct. at 2536 and n.5. The collective logic of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002), and *Blakely* requires sentencing facts to be treated as elements if they help determine the permissible punishment. Bibas, *Blakely's Federal Aftermath*, *supra* at *3; King & Klein, *Beyond Blakely*, *supra* at *6. Facts that authorize a judge to impose a longer sentence at least seem to be the functional equivalent of elements, although it is odd (and of constitutional concern) if the Sentencing Commission can effectively legislate elements of a crime.

The Seventh Circuit noted the possibility that facts exposing a defendant to a longer sentence must be treated as elements;[3] if so, the attempt to re-indict with those facts after the trial is over would violate the right to be free from double jeopardy. *Booker*, 2004 WL 1535858 at *5. The Court need not reach these difficult questions in respondent's case

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[3] The Justice Department apparently came to that conclusion quickly. Federal prosecutors have been instructed to charge sentence-enhancing facts in new indictments and to seek superseding indictments in pending cases. Comey memorandum, *supra* at 2.

because the absence of legislative authorization for sentencing trials provides an adequate ground to reject that aspect of the Seventh Circuit's opinion.

E. If the Petition is Accepted, Briefing Should Not Be Expedited

The federal appellate courts are capable of resolving many *Blakely* issues, as are the highest courts of the states in which *Blakely* issues will arise. These issues will continue to filter through the courts, and the results are more likely to be enlightening than damaging.

As respondent demonstrates in his response to the petitioner's motion to expedite the briefing schedule, the government overstates the need for urgent action. All Vice Chairs of the Sentencing Commission agree that federal sentencing is not operating in crisis mode. Response, ¶¶ 2, 6. The parties, the lower federal courts, and this Court need to take their time to allow fair consideration of these important issues. Allowing the customary time for briefing provided by Supreme Court Rule 25 will enhance the quality and usefulness of the briefs while protecting the Court from unforeseen consequences that may arise from inadequately developed arguments.

CONCLUSION

This case presents important issues that should be accepted for review. If, however, cases from the appellate courts arise that have more thoroughly considered the questions presented in the petition, it may be best to focus on those cases and either to decide

respondent's case in conjunction with them or to hold respondent's case until the issues have been resolved through more a more appropriate vehicle.

Respectfully submitted.

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July 28, 2004.

Supreme Court, U.S.
FILED
JUL 29 2004
OFFICE OF THE CLERK

(2) (1)

Nos. 04-104 and 04-105

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

FREDDIE J. BOOKER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, PETITIONER

v.

DUCAN FANFAN

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF CONTENTS

		Page
A.	The Court should grant review on the questions as formulated by the petitions	2
B.	The petitions in *Booker* and *Fanfan* provide the most suitable vehicles for this court's resolution of the questions presented	8
	1. There are no procedural impediments to this Court's review in *Booker*	8
	2. There is ample justification for granting certiorari before judgment in *Fanfan*	12
	3. The alternative vehicles on this Court's docket do not merit plenary review in preference to *Booker* and *Fanfan*	16
C.	The case for expedited consideration is compelling	18

TABLE OF AUTHORITIES

Cases:

Apprendi v. *New Jersey*, 530 U.S. 466 (2000)	4, 7
Blakely v. *Washington*, 124 S. Ct. 2531 (2004)	1, 3, 4, 5, 10, 17
Goodine v. *United States*, cert. denied, 124 S. Ct. 1600 (2004)	12
Gratz v. *Bollinger*, 539 U.S. 244 (2003)	13
Grutter v. *Bollinger*, 539 U.S. 306 (2003)	13
Gutierrez v. *United States*, cert. denied, 124 S. Ct. 2811 (2004)	15
Harris v. *United States*, 536 U.S. 545 (2002)	4
Jones v. *United States*, 526 U.S. 227 (1999)	4
Mistretta v. *United States*, 488 U.S. 361 (1989)	13
Newport v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981)	10
Ring v. *Arizona*, 536 U.S. 584 (2002)	7
Sabri v. *United States*, 124 S. Ct. 1941 (20004)	6

Cases—Continued: Page

United States v. *Ameline*, 2004 WL 1635808 (9th Cir. July 21, 2004) 8
United States v. *Cotton*, 535 U.S. 625 (2002) 4
United States v. *Gaudin*, 515 U.S. 506 (1995) 10
United States v. *Mooney*, 2004 WL 1636960 (8th Cir. July 23, 2004) 9
United States v. *Penaranda*, 2004 WL 1551369 (2d Cir. July 12, 2004), certification docketed, No. 04-59 (July 13, 2004) 2

Constitution, statutes, regulations and rules:

U.S. Const.:
Amend. V (Due Process Clause) 3, 10
Amend. VI 3, 10, 14
Sentencing Reform Act of 1984, 18 U.S.C. 3551 *et seq.* 7
18 U.S.C. 922(g) 17
18 U.S.C. 1001 10
21 U.S.C. 841 ..... 11, 12, 14, 15
21 U.S.C. 841(a) 11
21 U.S.C. 841(b) 11, 12
21 U.S.C. 841(b)(1)(A)(iii) 11
21 U.S.C. 841(b)(1)(B)(ii) 15
United States Sentencing Guidelines:
§ 2D1.1(c)(2) 12
§ 3C1.1 12
Ch. 5, Pt. A 12
Fed. R. Crim. P.:
Rule 32 7
Rule 32(i) 7
Sup. Ct. R.:
Rule 11 12
Rule 14.1(a) 6, 7

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ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondents and Amici National Association of Criminal Defense Lawyers, et al. (NACDL) agree that the issues raised by the petitions in this case are of seminal importance and warrant this Court's review. Booker Br. in Response (Br.) 3-5; Fanfan Br. in Opp. 4; NACDL Amici Br. 2. There can be no doubt that this Court's prompt action is warranted. Even though little more than a month has passed since this Court's decision in *Blakely* v. *Washington*, 124 S. Ct. 2531

(2004), the courts of appeals are already divided on both of the questions presented by the petitions, and that division has deepened since the filing of the petitions in these cases. Scores of district courts have issued opinions on the implications of *Blakely* for the Sentencing Guidelines and for sentencing in the federal system. The fragmentation of the law on the most basic questions in federal sentencing presents a compelling case for guidance from this Court, in order to stem a flood tide of contradictory approaches applied in thousands of sentencings—many of which may have to be redone once this Court settles the applicable law. The emerging "crisis in the administration of criminal justice in the federal courts" that the en banc Second Circuit predicted in its order certifying questions to this Court (*United States* v. *Penaranda*, 2004 WL 1551369, *7 (July 12, 2004), certification docketed, No. 04-59 (July 13, 2004), is a reality. There is no issue in the federal courts today that more urgently requires this Court's immediate attention.

Respondents and their amici, however, urge this Court to reframe the questions presented in the government's petitions, grant review in different cases than the government has proposed (or grant review in at most one of those cases), and set a more relaxed schedule for briefing and argument than proposed by the government. Those suggestions should be rejected. The Court should grant both of the petitions in these cases and calendar them for expedited briefing and argument.

A. The Court Should Grant Review On The Questions As Formulated By The Petitions

All three of the briefs filed by respondents and their amici reformulate the questions presented, and the NACDL suggests that this Court do likewise "to make them clearer and to ensure that the lower courts receive guidance on the core issues they now confront." NACDL Amici Br. 2. None of the purported reasons for altering the questions presented in the petitions justifies that unusual action.

1. The government's first question presented squarely and plainly raises the issue of whether *Blakely* applies to the Guidelines. It asks:

> Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.

The NACDL first suggests (Amici Br. 3-4) that the question is "underinclusive" because it refers only to the Sixth Amendment, and not to the Due Process right to proof beyond a reasonable doubt and to the Fifth Amendment right to a Grand Jury indictment. *Blakely* itself, however, was expressly decided under the Sixth Amendment jury trial guarantee. 124 S. Ct. at 2534 ("We consider whether [Blakely's sentence] violated petitioner's Sixth Amendment right to trial by jury."); *id.* at 2538 ("Because the State's sentencing procedure did not comply with the Sixth Amendment, petitioner's sentence is invalid."). The question presented is therefore responsive to *Blakely*'s actual holding. Nevertheless, the Court's decisions make abundantly clear that the right to jury trial is interlinked with the requirement of proof beyond a reasonable doubt and, in the federal system, with the right to a grand jury indictment. *Blakely* itself noted the connection to the

requirement of proof beyond a reasonable doubt.[1] Other decisions of this Court make manifest that, in a federal case, the grand jury right goes hand-in-hand with the rights identified in *Apprendi*.[2] There is no need to broaden the question presented here in order to obtain resolution of those issues.

NACDL also faults (Amici Br. 4) the question presented for using the phrase "enhanced sentence" to refer to a Guidelines sentence that is increased based on a fact "not found by the jury or admitted by the defendant." *Booker* Pet. I; *Fanfan* Pet. I. There is nothing mysterious about that phrase. It embraces, with simplicity and clarity, *all* of the types of Guidelines

[1] The Court's analysis began by stating that it was applying "the rule we expressed in *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000): 'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, *and proved beyond a reasonable doubt*.'" 124 S. Ct. at 2536 (emphasis added) (quoting *Apprendi*, 520 U.S. at 490); see *id.* at 2542 ("Every new element that a prosecutor can threaten to charge is also an element that a defendant can threaten to contest at trial and make the prosecutor prove beyond a reasonable doubt.").

[2] See *United States* v. *Cotton*, 535 U.S. 625, 627 (2002) (stating, after quoting the rule expressed in *Apprendi*, that "[i]n federal prosecutions, such facts must also be charged in the indictment"); *Harris* v. *United States*, 536 U.S. 545, 549, 568 (2002) (considering whether the *Apprendi* rule applies to facts that raise the mandatory minimum within the otherwise-authorized range of punishment, in a case where the defendant waived the right to jury trial but contended that reliance on the minimum-enhancing fact violated his rights to a grand jury indictment and proof beyond a reasonable doubt); *Jones* v. *United States*, 526 U.S. 227, 243 n.6 (1999) (proposing the rule later adopted in *Apprendi* as "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt").

factors that result in a sentence above the maximum that is justified "*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*," *Blakely*, 124 S. Ct. at 2537—whether those factors are denominated under the Guidelines as "offense characteristics," "adjustments," or "departures."

2. The government's second question raises the issue of remedy. It asks, if the Court holds that *Blakely* does apply to the Guidelines:

> [W]hether, in a case in which the Guidelines would require the court to find a sentence-enhancing fact, the Sentencing Guidelines as a whole would be inapplicable, as a matter of severability analysis, such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the offense of conviction.

NACDL suggests that because the question contains "four untested assumptions about the appropriate 'remedy,'" it should be replaced with the question: "What role do the Sentencing Reform Act, the Sentencing Guidelines, and Federal Rule of Criminal Procedure 32 continue to play in federal criminal sentencing?" NACDL Amici Br. 5.

The NACDL's proposal is unsound. As an initial matter, the open-ended and nebulous character of that question deprives it of the sort of clarity and specificity that is conducive to focused decision making by this Court. A question asking "[w]hat role" various provisions should play at sentencing gives no guidance to the parties, potential amici, or the Court about the specific legal issues that are posed and crystallized for decision. NACDL's question also makes no effort to respond to the particular circumstances of any case. Cf.

Sup. Ct. R. 14.1(a) (requiring a petition to contain "questions presented for review, expressed concisely *in relation to the circumstances of the case*") (emphasis added).

Beyond that, NACDL's "untested assumption" criticism of the government's question is unfounded. First, NACDL supposes that the government's question assumes that "the Guidelines would continue to apply without modification in those cases in which the Guidelines do not call on the judge to decide 'a sentencing-enhancing fact.'" Amici Br. 5. That is indeed the government's position; a defendant should not be permitted to invalidate a statutory and regulatory scheme that in no way infringes *his* constitutional rights. See, *e.g.*, *Sabri* v. *United States*, 124 S. Ct. 1941, 1948-1949 (2004). But the facts of the cases before the Court do not raise that issue. In each of those cases, the Guidelines *did* require the judge to enhance the sentence based on a fact not found by the jury. For that reason, the question presented is properly tailored to the issues raised by the cases at hand. Respondents would be free to urge, and this Court to adopt, a broader remedial theory than the facts require. But the government's question presented is tied to the facts of the actual cases before the Court.

Second, the NACDL argues (Amici Br. 6-7) that the government's question assumes that there is only a "binary" choice as to remedy: either the Guidelines apply as a whole, or they do not. But in answering the government's question, the Court would be free to embrace any of the range of remedial options presented by the facts of the cases. The question presented does not limit

the Court to total acceptance or rejection of the government's proposed remedy.[3]

Finally, NACDL would have the Court expand its review to encompass remedial issues under the Sentencing Reform Act of 1984, 18 U.S.C. 3551 *et seq.*, and Federal Rule of Criminal Procedure 32(i). NACDL Amici Br. 8. The short answer to that proposal is that unbounded expansion of the questions in this case to sweep in *all* such remedial issues deprives the Court of more limited questions that are tied to the facts of the cases. More generally, the parties would be free to address, as "fairly included" (Sup. Ct. R. 14.1(a)) in the question presented, the proper severability analysis of the Sentencing Reform Act insofar as it bears on the applicability of the Guidelines. And implications for judicial factfinding under Rule 32(i) will follow logically from this Court's resolution of the questions as framed in the government's petitions.

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[3] NACDL also critiques (Amici Br. 7) the phrase "sentence-enhancing fact" as "a concept of the government's invention," which (it says) is not recognized in the *Apprendi* line of cases. The NACDL would apparently force the parties to limit their vocabulary to "elements" and "sentencing factors." There is no obvious reason why the language of the question presented should be so constrained. See *Ring* v. *Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring) (describing jury trial guarantee as applying to "facts essential to imposition of the level of punishment * * * whether the statute calls them elements of the offense, sentencing factors, or Mary Jane"); cf. *Apprendi*, 530 U.S. at 494 (referring to the "novel and elusive distinction between 'elements' and 'sentencing factors'"); *id.* at 494 n.19 (referring to "sentence enhancements" that are the "functional equivalent" of "an element of a greater offense"). If certiorari is granted, NACDL is certainly free to argue against the phrase "sentence-enhancing fact" as used to describe facts that under the Guidelines enhance the sentence.

B. The Petitions In *Booker* and *Fanfan* Provide The Most Suitable Vehicles For This Court's Resolution Of The Questions Presented

Fanfan acknowledges (Br. in Opp. 7) that "[i]t may be true that, in view of the practical importance of obtaining a prompt resolution of the questions presented, prudence counsels in favor of granting certiorari in more than one case, simply to guard against the risk that a barrier to review may arise in any single case." Accord NACDL Amici Br. 8 ("*Amici* submit that it would be appropriate for the Court to grant dual petitions for certiorari"). But Booker, Fanfan, and Amici all have different ideas about which cases are best suited for review. Closely examined, the purported procedural drawbacks of the government's petitions are without merit, and the cases offered as substitutes come equipped with their own problems.

1. There are no procedural impediments to this Court's review in Booker

a. Booker acknowledges (Br. 5) that the Seventh Circuit's decision is an adequate vehicle for addressing the first question presented, but he contends (Br. 6-8) that it is not a good vehicle for reviewing the second, remedial, question, because that issue was not briefed or decided by the court of appeals. In an ordinary case, that point would have merit. Here, it does not. The purely legal issues surrounding what remedy is justified on remand (if the Court were to hold that *Blakely* applies to Guidelines sentencing) have now been adequately illuminated by a plethora of decisions by the district courts and two conflicting decisions of federal courts of appeals.[4] The reasoning in those cases is avail-

[4] Compare *United States* v. *Ameline*, 2004 WL 1635808 (9th Cir. July 21, 2004) (finding the requirement of judicial fact-finding under the Guidelines to be severable and applying *Blakely*'s procedures to the determination of sentence-enhancing facts under the Guidelines), with *United States* v. *Mooney*, 2004 WL 1636960 (8th Cir. July 23, 2004) (finding the Guidelines system not to be severable once *Blakely* renders it in part unconstitutional, and requiring sentencing to be conducted as a matter of judicial discretion within the statutory minima and maxima, using the Guidelines as advisory).

able to the Court, regardless of the vehicles selected for review. Here, the court of appeals at least applied *Blakely* to the Guidelines and outlined possible options available to the parties and the court on remand. This Court can decide *Booker*, if it concludes that *Blakely* applies to the Guidelines, by explaining which options are legally permissible.

Booker's remaining contention (Br. 8-16) is that, in his view, the government's severability analysis was hastily formulated and is wrong, suggesting that the Court should move more cautiously and await further analysis in the lower courts before granting review. Booker's disagreement with the government is a matter for response at the merits stage of this case; but his suggestion that delay would be beneficial to justice is plainly incorrect. There is already an abundance of legal analysis on *Blakely* issues that outstrips what the Court has available for many issues that it decides. Two courts of appeals have addressed remedy issues (see note 4, *supra*); expedited en banc review is underway in two more. And other courts of appeals may well issue decisions before this Court rules. But above all, awaiting further percolation in the lower courts is not a luxury that the federal criminal justice system can afford. There is a pressing need for this Court immediately to step in and restore uniformity to federal sen-

tencing—and that need mandates that review be undertaken now, not in the fullness of time.

b. NACDL raises a number of other purported procedural problems with *Booker*. NACDL points out that the defendant there did not preserve a Fifth and Sixth Amendment claim either at trial or on appeal; "instead, the court of appeals raised the issue *sua sponte*." Amici Br. 9. But NACDL fails to note that the Seventh Circuit amended its opinion to state that the government had not raised a claim that Booker forfeited his objection, and thus the court did not consider plain error. *Booker* Pet. App. 26a-27a. The government's petition for certiorari does not present any issue of plain error. And to remove any doubt, the government confirms now that it does not rely on the plain-error doctrine in this case. Cf. *United States* v. *Gaudin*, 515 U.S. 506 (1995) (resolving question whether materiality is a jury issue in a prosecution under 18 U.S.C. 1001); *id.* at 526-527 (Rehnquist, C.J., concurring) (noting that the Court "has no occasion today" to review the court of appeals' rulings that the error was plain and not harmless, because "the Government has not argued here that the error in this case was either harmless or not plain"); see also *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 257 (1981) (overlooking the plain-error rule where the Court's failure to decide the issue on the merits "would serve neither to promote the interests of justice nor to advance efficient judicial administration").

Similarly, contrary to NACDL's suggestion (Amici Br. 9), the government does not argue that Booker's statement to the police admitting that he sold the drugs that were the basis for the Guidelines sentence enhancement constituted an "admission" within the meaning of *Blakely*. See *Blakely*, 124 S. Ct. at 2541

(noting that enhancements are not barred if the defendant "either stipulates to the relevant facts or consents to judicial factfinding"). Booker never admitted those facts in a judicial proceeding; instead, at trial, he contradicted his earlier statements. Booker Pet. 3. Nor does the government argue in this case that, by virtue of Booker's statements, any *Blakely* error would be harmless.

c. NACDL also argues against granting certiorari in *both Booker* and *Fanfan* because both arise from drug convictions. Amici Br. 15-18. NACDL offers a convoluted argument that the internal statutory maximum and minimum sentences created by the federal drug statute, 21 U.S.C. 841, create unspecified "complications" that make drug cases "ill-suited vehicles" to decide whether *Blakely* applies to the Sentencing Guidelines. But NACDL offers no explanation of why that is so. The facts show that any such purported statutory issues are wholly irrelevant.

Booker was charged in an indictment with possessing more than 50 grams of cocaine base with intent to distribute it and distributing cocaine base, both in violation of 21 U.S.C. 841(a). *Booker* Pet. App. 31a-32a. The jury found him guilty of that offense. *Id.* at 1a. The statutory sentencing range for drug offenses involving 50 grams or more of cocaine base is ten years to life imprisonment. 21 U.S.C. 841(b)(1)(A)(iii). Thus, the indictment's allegations and the jury's verdict sufficed, as far as Section 841(b) is concerned, to support any Guidelines sentence that Booker could receive, up to and including a sentence of life imprisonment. And Booker clearly received the protection of the constitutional rights described in *Apprendi* on the determination of the relevant threshold drug quantity under Section 841.

The *Blakely* issue arises solely because an offense involving *only* the amount of cocaine base established at trial would translate into a Guidelines range (for a defendant with Booker's criminal history category) of 210-262 months of imprisonment. The district court's consideration of Booker's additional drugs and his obstruction of justice, which were not found by the jury, raised the Guidelines range to 360 months to life imprisonment. Sentencing Guidelines §§ 2D1.1(c)(2), 3C1.1; *id.* Ch. 5, Pt. A (Sentencing Table). Resolution of the constitutionality of that increase in the Guidelines sentence would not require the Court to delve into *any* of "Section 841's ambiguities post-*Blakely*" (NACDL Amici Br. 16). Regardless of how the Court decides the *Blakely* issues under the Guidelines, Booker has no complaint about the process he received to justify his sentence under Section 841.[5]

2. There is ample justification for granting certiorari before judgment in Fanfan

Fanfan argues principally (Br. in Opp. 7-11) that certiorari before judgment is not warranted here because the government has not made the showing required under this Court's Rule 11. He asserts (Br. in

[5] NACDL adverts (Amici Br. 17) to a purported "significant controversy" over whether drug quantity is *statutorily* defined as an element of an offense. Even assuming that the threshold drug quantities in Section 841(b) were "elements," Booker received all the process that would apply to such "elements" (*i.e.*, indictment, jury trial, and proof beyond a reasonable doubt). The *only* controversy in this case pertains to determinations of drug quantity under the Sentencing Guidelines. NACDL's confused effort to inject into this case irrelevant issues under Section 841 (on which this Court has denied certiorari many times, *e.g.*, *Goodine* v. *United States*, cert. denied, 124 S. Ct. 1600 (2004); note 6, *infra*) provides no basis for declining to grant review in *Booker*.

Opp. 7) that the government has not established why *this* case warrants the "extraordinary step of granting certiorari before judgment." But it is of paramount importance that the issues raised in the case be considered by this Court at the earliest opportunity —and that is an exceptional circumstance that distinguishes this case from the ordinary situation.

a. Fanfan concedes (Br. in Opp. 9) that the Court granted certiorari before judgment in *Mistretta* v. *United States*, 488 U.S. 361, 371 (1989), "[b]ecause of the 'imperative public importance' of the issue * * * and because of the disarray among the Federal District Courts." The issue that was of "imperative public importance" in *Mistretta* is closely related to the issue here: the constitutionality and continued applicability of the Sentencing Guidelines. The disarray among the lower courts here is also comparable to that in *Mistretta*, and the disarray is increasing daily.

Fanfan also argues (Br. in Opp. 9) that "the Court could certainly resolve the questions presented by granting review solely in *Booker*." As respondent also concedes, however, the Court has granted review in other cases before judgment when the case is a "necessary counterpart[] to important cases that themselves reached this Court in the ordinary course." *Ibid.* (citing *Gratz* v. *Bollinger*, 539 U.S. 244 (2003), which was reviewed with *Grutter* v. *Bollinger*, 539 U.S. 306 (2003)). *Fanfan* and *Booker* likewise provide "necessary counterparts" to one another in resolving the urgent questions presented by this case. Indeed, *Fanfan* is the *only* case currently before the Court in which any court has held *Blakely* applicable to the Guidelines and then imposed a remedy for what it perceived to be constitutional flaws in the application of the Guidelines to that case. Granting review in both

Booker and *Fanfan* would also protect against the possibility that any later impediment in one or the other case could prevent timely resolution of the issues.

Finally, Fanfan argues (Br. in Opp. 11) that "this case is not a logical companion to *Booker*—at least no more so than any of the hundreds of cases now pending in the courts of appeals that involve Sixth Amendment challenges to the application of the Sentencing Guidelines." The pendency of "hundreds of cases" raising *Blakely* issues in the brief period since *Blakely* was decided confirms the need for quick resolution of the questions presented in *Booker* and *Fanfan*. And speculation that some other case not on the Court's docket could provide a better vehicle fails to come to grips with the glaring need for expedited consideration of the issues now. Awaiting the filing of petitions in other cases (which may have their own procedural flaws would be to ignore the urgent need for guidance that the lower federal courts have justifiably requested.

b. Fanfan also suggests (Br. in Opp. 11-12) that there is a "logically antecedent" issue under Section 841 that "may well prevent resolution of the question the petition seeks to bring before this Court." According to Fanfan, that issue is "whether 21 U.S.C. §§ 841 and 846 are themselves unconstitutional because they can be read to establish graduated statutory sentencing levels—antecedent to the Guidelines—in apparent reliance on judicial fact-finding using a preponderance standard." Br. in Opp. 12. That suggestion lacks merit. Fanfan fails to mention that he never raised such a constitutional attack in the district court. Nor has he cross-petitioned in this Court. There is no accepted principle of procedure that would permit him to inject such an issue into the case now. In any event, the lower federal courts have universally rejected any claim that

Section 841 is unconstitutional on the basis asserted, and this Court has repeatedly denied review (as Fanfan himself notes, *ibid.*).[6]

The facts of this case also raise no issue of whether Fanfan's *statutory* sentencing range under Section 841 was established without compliance with the procedures required by *Apprendi* (and *Blakely*). The indictment alleged, and the jury found, the threshold quantity of drugs necessary to establish a statutory punishment ceiling that is well above the highest of the possible Sentencing Guidelines ranges. Fanfan was indicted for conspiracy to distribute and to possess with intent to distribute 500 grams or more of cocaine. *Fanfan* Pet. App. 14a. The jury found him guilty as charged, and specifically found that the amount of cocaine was "500 or more grams." *Id.* at 15a. Under 21 U.S.C. 841(b)(1)(B)(ii), a drug offense involving 500 or more grams of cocaine is punishable by 5 to 40 years of imprisonment. The indictment and jury verdict in Fanfan's case thus authorized a *statutory* sentence of up to 40 years.[7] As is the case with Booker, Fanfan can have no constitutional complaint about the indictment, jury trial, and reasonable doubt procedures that he was accorded in establishing that 40-year ceiling.

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[6] For a partial collection of the legion of cases rejecting the claim and this Court's orders denying certiorari, see U.S. Brief in Opp., at 11 n.8 & 13 n.9, *Gutierrez* v. *United States*, No. 03-8728, 2004 WL 1062088, at *5 nn. 8-9 (May 5, 2004). In *Gutierrez*, this Court once again denied certiorari. 124 S. Ct. 2811 (2004).

[7] The government's petition mistakenly stated that the maximum sentence was life imprisonment under the statute. *Fanfan* Pet. 2. As Fanfan points out (Br. in Opp. 12 & n.12), the government's position in the district court was that the maximum is 40 years. The error in the petition, on which the government gratefuliy stands corrected by Fanfan, is of no consequence to any legal issue properly presented in this case.

The *Blakely* issue arises only because Fanfan's Sentencing Guidelines range, as the court determined it in light of *Blakely* based solely on the facts found by the jury, was 63-78 months of imprisonment, while his range based on the judge's findings as required by the Guidelines was 188-235 months. *Fanfan* Pet. App. 2a, 6a. Either of those ranges is above the statutory minimum of five years and below the maximum of 40 years that was established by the indictment and jury verdict. There is therefore no constitutional issue in this case surrounding the procedures used to implement Section 841; the only constitutional questions are the ones presented by the petition.

3. The alternative vehicles on this court's docket do not merit plenary review in preference to Booker and Fanfan

In lieu of granting certiorari in *Booker* and *Fanfan*, respondents and the NACDL argue that this Court should grant certiorari in other cases on the Court's docket. Examination of those cases reveals that they are not preferable vehicles for resolving the vitally important issues at stake. Nor should the Court await the filing of other certiorari petitions that raise the same issues (and that also may have serious, if presently unknown, procedural flaws), with the necessary consequence of delay.

a. *Bijou* v. *United States*, *No. 04-5272*. Fanfan (Br. in Opp. 14) and the NACDL (Amici Br. 11) propose *Bijou* v. *United States* as the appropriate vehicle (or companion vehicle) for resolution of the questions presented. In *Bijou*, the Fourth Circuit rendered an unpublished decision rejecting the defendant's *Apprendi* claim before *Blakely* was even decided. Thus, no lower court has examined the implications of *Blakely* for Bijou's Guidelines sentence. In addition, the petition in *Bijou* presents only a single question concerning the *applicability* of *Blakely* to the Guidelines.[8] The petition raises *no* issue concerning the remedy if *Blakely* does apply to the Guidelines—an issue that all agree is of the utmost importance for this Court to resolve. To surmount that obstacle, NACDL proposes reformulation of the issues in Bijou's petition and states that counsel for Bijou now supports review of those issues. Amici Br. 11 & n.6. There is scant justification, however, for granting review in a case where the petitioner himself has only belatedly decided to adopt amici's formulation of the questions. And, as discussed above, the NACDL's reformulation of the issues is unnecessary and, on the second question, seriously flawed.

NACDL also asserts (Amici Br. 12) that *Bijou* has a "considerable advantage" over the other pending petitions because "it arises from a guilty plea." Yet the NACDL fails to identify how the guilty-plea posture is relevant to the issues. The government would not contend in *Bijou* that, by virtue of Bijou's guilty plea to felon-in-possession charges under 18 U.S.C. 922(g), he waived any rights he may have under *Blakely* to object to his enhanced sentence based on judicial findings about his drug activity. Cf. *Blakely*, 124 S. Ct. at 2535-2536 (noting that Blakely raised his constitutional objection to the increase in his sentence for "deliberate cruelty" after pleading guilty to second-degree kidnapping). Instead, the facts of *Bijou* raise only the same issue presented by the first question in *Booker*, *i.e.*, the constitutionality of sentences enhanced under

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[8] The question presented in *Bijou* states: "Whether a fact necessary for an increase in offense level under the United States Sentencing Guidelines must be alleged and proved according to the requirements of the Sixth Amendment as set forth in *Blakely* v. *Washington*." 04-5272 Pet. at i.

the Guidelines "based on the sentencing judge's determination of a fact not * * * found by the jury or admitted by the defendant." 04-104 Pet. I.

b. *Pineiro* v. *United States*, *No. 04-5263*. NACDL suggests (Amici Br. 10) that in lieu of *Booker*, the Court may wish to grant the petition filed in *Pineiro* v. *United States*, *supra*. That course is unwarranted. *Pineiro* does involve a court of appeals decision that considered whether *Blakely* applies to the Guidelines. But that feature of the case does not differentiate it from *Booker*. And in *Pineiro*, unlike *Fanfan*, no court formulated or applied a remedy for a perceived *Blakely* problem. Indeed, the *Pineiro* petition presents only a single question, again focusing on *Blakely*'s applicability to the Guidelines.[9] No remedial issue is raised. And there is no indication that the petitioner in *Pineiro* would adopt the (flawed) NACDL formulation of the remedial issue. There is thus no reason for this Court to prefer *Pineiro* over the government's petitions.

C. The Case For Expedited Consideration Is Compelling

As explained more fully in the government's reply in support of its motion for expedited consideration, the federal judicial system is in dire need of this Court's prompt resolution of the issues presented. The defense bar's caution aside—a caution that coincides with the reduced sentences that many defendants are receiving in the current reign of confusion over *Blakely*—there is widespread sentiment in the lower federal judiciary

[9] The question presented in *Pineiro* states: "Does a federal judge violate a defendant's Sixth Amendment jury trial rights by increasing the defendant's sentence through the application of federal sentencing guideline provisions that are supported by facts found by the judge and not the jury?" 04-5263 Pet. at i.

that, absent this Court's expedited intervention, federal sentencing threatens to descend even further into a balkanized set of regimes in which each circuit, if not each individual district court judge, literally makes up the rules as he or she goes along. This chaotic state of affairs cannot stand. It can only be rectified by expeditious action by this Court.

* * * * *

For the reasons given above and in the petitions, it is respectfully submitted that the petition for a writ of certiorari in *Booker* and the petition for a writ of certiorari before judgment in *Fanfan* be granted.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

JULY 2004

(1) (3) (3)
Supreme Court, U.S.
FILED
JUL 28 2004
OFFICE OF THE CLERK

Nos. 04-5272, 04-105, 04-104

IN THE

Supreme Court of the United States

Jimmy Bijou,
Petitioner,
v.
United States.

United States,
Petitioner,
v.
Ducan Fanfan.

United States,
Petitioner,
v.
Freddie J. Booker.

On Petitions for Writs of Certiorari
to the United States Courts of Appeals
for the Fourth and Seventh Circuits and
a Writ of Certiorari Before Judgment to the First Circuit

BRIEF *AMICI CURIAE* OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND NATIONAL ASSOCIATION OF FEDERAL DEFENDERS

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July 27, 2004

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QUESTIONS PRESENTED

1. Whether a district court violates the Fifth and Sixth Amendments by relying upon facts that increase the maximum sentence available under the United States Sentencing Guidelines (other than the fact of a prior conviction) when those facts were not charged in the indictment and either found by the jury on proof beyond a reasonable doubt or admitted by the defendant.

2. If the answer to the first question is "yes," the following question is presented: What role do the Sentencing Reform Act, the Sentencing Guidelines, and Federal Rule of Criminal Procedure 32 continue to play in federal criminal sentencing?

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
INTERESTS OF *AMICI CURIAE* 1
ARGUMENT 1
I. The Court Should Reframe The Questions Presented. 3
II. The Court Should Grant Certiorari in *Booker* or in No. 04-5263, *Pineiro* v. *United States*, Should Also Grant Certiorari in No. 04-5272, *Bijou* v. *United States*, and Should Deny the Petition for Certiorari Before Judgment in *Fanfan*. 8
CONCLUSION 19

TABLE OF AUTHORITIES

Cases

Almendarez-Torres v. *United States*, 523 U.S. 224 (1998) 7
Apprendi v. *New Jersey*, 530 U.S. 466 (2000) ..... passim
Blakely v. *Washington*, 124 S. Ct. 2531 (2004)..... passim
Castillo v. *United States*, 530 U.S. 120 (2000)..... 7
Dames & Moore v. *Regan*, 453 U.S. 654 (1981)..... 13
Foley v. *Carter*, 449 U.S. 1073 (1981)..... 13
Gratz v. *Bollinger*, 539 U.S. 244 (2003) 14
Grutter v. *Bollinger*, 539 U.S. 306 (2003)..... 15
Iran National Airlines Corp. v. *Maschalk Co.*, 453 U.S. 919 (1981)..... 13
Jones v. *United States*, 526 U.S. 227 (1999) 7
Mistretta v. *United States*, 488 U.S. 361 (1989)..... 15
Mitchell v. *United States*, 526 U.S. 314 (1999)..... 12
Pineiro v. *United States*, 2004 U.S. App. LEXIS 14259 (CA5 2004) ..... passim
United States v. *Ameline*, 2004 U.S. App. LEXIS 15031 (CA9 July 21, 2004)..... 8
United States v. *Bijou*, 92 Fed. Appx. 966 (CA4 2004) 12
United States v. *Cotton*, 535 U.S. 625 (2002) 1
United States v. *Darwich*, 337 F.3d 645 (CA6 2003)..... 18
United States v. *Goodine*, 326 F.3d 26 (CA1 2003), cert. denied, 124 S. Ct. 1600 (2004) 18
United States v. *Graham*, 317 F.3d 262 (CADC 2003)..... 17
United States v. *Khan*, No. 02-CR-1242 (JBW), 2004 U.S. Dist. LEXIS 13192 (E.D.N.Y. July 12, 2004)... 7
United States v. *King*, No. 6:04-cr-35-Orl-31KRS, 2004 U.S. Dist. LEXIS 13496 (M.D. Fla. July 19, 2004) .. 6
United States v. *Landgarten*, No. 04-CR-70 (JBW), 2004 U.S. Dist. LEXIS 13172 (E.D.N.Y. July 15, 2004)... 7

United States v. *Mendoza-Gonzalez*, 318 F.3d 663 (CA5), cert. denied, 123 S. Ct. 2114 (2003) 18
United States v. *Montgomery*, No. 03-5256, 2004 U.S. App. LEXIS 14384 (CA6 July 14, 2004) 6
United States v. *Montgomery*, No. 2:03-CR-801 TS, 2004 U.S. Dist. LEXIS 12700 (D. Utah July 8, 2004) 4, 6, 7
United States v. *Muefffleman*, 2004 U.S. Dist. LEXIS 14114 (D. Mass. July 26, 2004) 5, 8
United States v. *Nance*, 236 F.3d 820 (CA7 2000) 9
United States v. *Penaranda*, 2004 WL 1551369, (CA2 July 12, 2004) (en banc) 7, 13
United States v. *Players Int'l Inc.*, 525 U.S. 1094 (1999) 15
United States v. *Roberts*, No. 03-CR-1369 (LAK) (S.D.N.Y. July 9, 2004) 7
United States v. *Sanchez*, 269 F.3d 1250 (CA11 2001) 18
United States v. *Smith*, 308 F.3d 726 (CA7 2002) 18
United States v. *Terrell*, No. 8:04CR24, 2004 U.S. Dist. LEXIS 13781 (D. Neb. July 22, 2004) 6
United States v. *Thomas*, 274 F.3d 655 (CA2 2001) 18
United States v. *Vazquez*, 271 F.3d 93 (CA3 2001) 17
United States v. *Will*, 449 U.S. 200 (1980) 13

Statutes

18 U.S.C. 3006A ..... !
18 U.S.C. 3553(a) 6
18 U.S.C. 3553(b) 6
21 U.S.C. 841 ..... 15, 16, 17
21 U.S.C. 841(b) 16, 17
Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 8

Other Authorities

U.S.S.G. 2K2.1 11
U.S.S.G. 2K2.1(c)(1) 11

U.S.S.G. 2K2.1(c)(1)(A) 16

Rules

Fed. R. Crim. P. 32 2
Fed. R. Crim. P. 32(i) 8

Constitutional Provisions

U.S. Const. amend V 4, 9
U.S. Const. amend. VI 1, 3, 9

INTERESTS OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 11,200 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors.[1] The NACDL seeks to promote the proper administration of justice and to ensure that findings which affect the length of criminal sentences are made according to constitutionally required procedures. The NACDL has appeared as *amicus curiae* in this Court on numerous occasions, including in *Blakely* v. *Washington*, 124 S. Ct. 2531, 2542 (2004), *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *United States* v. *Cotton*, 535 U.S. 625 (2002).

The National Association of Federal Defenders (NAFD) was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. 3006A, and the Sixth Amendment of the United States Constitution. The Association is a nationwide, non-profit, volunteer organization whose membership includes attorneys and support staff of Federal Defender Offices. One of the NAFD's missions is to file *amicus curiae* briefs to ensure that the position of indigent defendants in the criminal justice system is adequately represented.

ARGUMENT

Amici submit that this Court should grant certiorari in No. 04-104, *United States* v. *Booker* or in No. 04-5263, *Pineiro* v. *United States*, and should also grant certiorari in No. 04-5272, *Bijou* v. *United States*, but should deny the petition for certiorari before judgment in No. 04-105, *United*

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amici curiae* state that no counsel for a party authored any part of this brief, and no person or entity, other than *amici curiae*, their members, and their counsel, made a monetary contribution to the preparation or submission of this brief.

States v. *Fanfan*. Regardless of which cases the Court decides to hear, it should decide two questions relating to the application of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), to the federal Sentencing Guidelines: first, whether judicial factfinding that results in an increase in a defendant's sentence pursuant to the Guidelines violates the rule of *Apprendi* (*id.* at 490) that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"; and second, if so, what role do the Sentencing Reform Act, the Sentencing Guidelines, and Fed. R. Crim. P. 32 continue to have?

In this brief, *amici* make two points regarding how the Court should resolve these questions. In sum, the Court should reframe the questions proposed by the Solicitor General to make them clearer and to ensure that the lower courts receive guidance on the core issues they now confront. And the Court should grant certiorari in *Bijou* rather than in *Fanfan* in order to ensure the best vehicle to decide the range of questions that require this Court's resolution.[2]

We discuss each issue in turn. Preliminarily, however, we submit that this is a case in which suggestions regarding the framing of the questions presented and the selection of appropriate cases to decide those questions deserve special attention. In all but the rarest instances, the government has the ability to select from an array of appellate decisions the most appropriate cases to present to this Court for decision, and it further has the luxury of time in crafting the questions presented. This is the rare exception. Here, the government's view that there is an extraordinarily urgent need for decision necessarily led it to begin immediately preparing petitions in the very first cases it lost in the lower courts after *Blakely*. As we discuss *infra*, those cases present a variety of potential

[2] *Amicus* NACDL has separately joined the response of the respondent in *Booker* to the government's motion to expedite.

procedural problems. The criminal defense community has subsequently undertaken an extensive review of the extant lower court decisions and pending petitions for certiorari to identify the most important questions that currently confront the lower courts and the cases in which the Court can best answer those questions. Moreover, we have consulted broadly regarding the framing of the questions presented and have held extended discussions with counsel to the defendants in the relevant pending petitions to identify a schedule that will ensure thorough briefing on these questions, which all agree require careful attention. We respectfully request that the Court give these recommendations careful consideration.

I. The Court Should Reframe The Questions Presented.

The questions presented by the government should be revised in a manner that simultaneously simplifies them and ensures that the Court will resolve all of the issues on which the lower courts most need guidance.

1. The first question presented by the government is intended to resolve whether the Constitution "preclude[s] a sentencing court (absent the defendant's consent) from finding facts * * * that increase a defendant's sentence under the Sentencing Guidelines beyond the level indicated based solely on the jury's findings or the defendant's admissions." *Booker* Pet. 14. As framed by the government, that question is:

> Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.

Booker Pet. i.

The question should be revised in several respects. First, the government's reference only to the *Sixth* Amendment is substantially underinclusive. The rights recognized by

Apprendi and its progeny include the Fifth Amendment rights to be convicted only upon proof beyond a reasonable doubt and, in the federal system, to be indicted by a grand jury. See *Apprendi*, 530 U.S. at 476. The proposed question's reference to a fact "found by the jury or admitted by the defendant" should thus refer to the requirement of an indictment and proof beyond a reasonable doubt.

The question should also be revised because its reference to an "enhanced sentence" is potentially misleading. Within the Guidelines' scheme, that phrase could be taken to refer only to sentencing enhancements – *viz.*, upward "adjustments" such as "specific offense characteristics." However, judicial factfinding under the Sentencing Guidelines often also determines, for example, the base offense level (as in *Booker* itself) and whether a court may impose any upward departures from the prescribed Guideline ranges (see *United States* v. *Montgomery*, No. 2:03-CR-801 TS, 2004 U.S. Dist. LEXIS 12700, at *15-*16 (D. Utah July 8, 2004)). Any of these determinations may result in a sentence beyond "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely*, slip op. at 7.

Given the foregoing, we propose the following as the first question presented:

> Whether a district court violates the Fifth and Sixth Amendments by relying upon facts that increase the maximum sentence available under the United States Sentencing Guidelines (other than the fact of a prior conviction) when those facts were not charged in the indictment and either found by the jury on proof beyond a reasonable doubt or admitted by the defendant.

2. The second question presented by the government is intended to determine what role, if any, the Guidelines will continue to play if they are subject to *Apprendi*. As framed by the government, that question is:

> If the answer to the first question is "yes," the following question is presented: whether, in a case in which the Guidelines would require the court to find a sentence-enhancing fact, the Sentencing Guidelines as a whole would be inapplicable, as a matter of severability analysis, such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the offense of conviction.

Booker Pet. i. The question as drafted by the government is flawed because it includes four untested assumptions about the appropriate "remedy" for *Apprendi*'s application to the Guidelines.

First, the government's proposed second question assumes that the Guidelines would continue to apply without modification in those cases in which the Guidelines do not call on the judge to decide "a sentence-enhancing fact." The Court should not indulge that assumption, which is in substantial tension with the government's own "severability" analysis that Congress would not have intended the Guidelines to operate only partially and only selectively as between "similarly situated defendants." *Booker* Pet. 15-17. See *United States* v. *Mueffleman*, 2004 U.S. Dist. LEXIS 14114, at *45-*46 (D. Mass. July 26, 2004) ("At the same time, it is worth noting that the Government advances a selective severability argument. They claim that the Guidelines are only unconstitutional with respect to cases involving sentencing enhancements. The system can be unseverable with respect to the enhancements. In those cases, the Government argues that the Guidelines are a seamless web, wholly unconstitutional, and the Court should sentence under the previous indeterminate regime. In contrast, in cases in which there are no enhancements, the Government argues the Guidelines apply. The argument makes no sense.").

The class of cases excluded by the Solicitor General's formulation is furthermore very large, and the consequences

of that exclusion for the criminal justice system would be sweeping, because the government's formulation apparently would exclude all cases in which no judicial factfinding enhances a defendant's sentence – *e.g.*, cases in which the government requires a defendant, as a condition of a plea agreement, to admit all the facts relevant to sentencing. But the lower courts have already divided on the question whether the Guidelines continue to apply in cases that do not require judicial factfinding, with those opposed to severability reasoning that the Guidelines are meant to apply to *all* defendants, or to none at all.[3] Accordingly, the Court should not accept the government's proposal to limit the remedial question to cases requiring judicial factfinding.

Second, the government's framing of the second question presented erroneously assumes that this Court will have only a single, binary choice when it comes to "remedy." That is, the government presumes that the two options are that the "the Sentencing Guidelines as a whole" would be applicable or inapplicable in every case that requires judicial factfinding

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[3] Compare *United States* v. *King*, No. 6:04-cr-35-Orl-31KRS, 2004 U.S. Dist. LEXIS 13496, at *25 (M.D. Fla. July 19, 2004) ("The suggestion that courts use the Guidelines in some cases but not others is at best schizophrenic and at worst contrary to basic principles of justice, practicality, fairness, due process, and equal protection."), with *United States* v. *Montgomery*, No. 2:03-CR-801 TS, 2004 U.S. Dist. LEXIS 12700, at *8 (D. Utah July 8, 2004) ("The problem lies in upward enhancements and departures * * *.") and *United States* v. *Terrell*, No. 8:04CR24, 2004 U.S. Dist. LEXIS 13781, at *10 (D. Neb. July 22, 2004) ("Application of the Guidelines will not violate the Constitution in every case * * * ."). See also *United States* v. *Montgomery*, No. 03-5256, 2004 U.S. App. LEXIS 14384 (CA6 July 14, 2004) (it is 18 U.S.C. 3553(b), not the Guidelines as such, which are unconstitutional under *Blakely*; § 3553(b) is severable from § 3553(a) and other provisions of the Sentencing Reform Act, leaving advisory guidelines in place), *vacated upon grant of rehearing en banc* (July 19, 2004), *and voluntarily dismissed* (July 23, 2004).

to determine the sentence. But the range of possibilities is much wider: As the Solicitor General explains, the lower courts have adopted "various attempts to implement *Blakely*." *Booker* Pet. 15 (quoting *United States* v. *Penaranda*, 2004 WL 1551369, at *7 (CA2 July 12, 2004) (en banc)).[4] For this Court to single out only one of those solutions would not only unnecessarily complicate the question presented, but it would also encourage the parties to slant their briefing and argument toward addressing the government's stark dichotomy rather than the full range of possible statutory results. A broader framing of the question is also preferable because it would give the Court the opportunity to reach a variety of remedial issues without committing the Court to any particular course.

Third, the government's reference to a "sentence-enhancing fact" imports a concept of the government's invention. It is not a principle recognized in *Apprendi* and its progeny. Instead – in a line of cases from *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), to *Jones* v. *United States*, 526 U.S. 227 (1999), to *Castillo* v. *United States*, 530 U.S. 120 (2000) – the Court has distinguished between "elements" and "sentencing factors." No doubt, the government's proposed phrasing is intended to focus the Court only on factfinding that exposes the defendant to higher

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[4] For example, district courts have imposed a sentence determined under the Guidelines but without any increases based on judicial factfinding, *United States* v. *Montgomery*, 2004 U.S. Dist. LEXIS 12700, at *11 (D. Utah July 8, 2004), convened special sentencing juries, *United States* v. *Landgarten*, No. 04-CR-70 (JBW), 2004 U.S. Dist. LEXIS 13172 (E.D.N.Y. July 15, 2004); see also *United States* v. *Khan*, No. 02-CR-1242 (JBW), 2004 U.S. Dist. LEXIS 13192, at *19-*41 (E.D.N.Y. July 12, 2004) (discussing justification for convening sentencing jury), and considered issuing supplemental verdict sheets to juries, see *United States* v. *Roberts*, No. 03-CR-1369 (LAK) (S.D.N.Y. July 9, 2004), *available at* http://www.ussguide.com/members/BulletinBoard/Blakely/02CA/Index2CA.cfm.

sentences. But whether the Court should shift from its prior focus on elements and sentencing factors to a new focus on "sentence-enhancing facts" should be the subject of briefing and argument, not an assumption built into the question presented.

Fourth, the government's formulation of the question presented incorrectly assumes that the "remedial" issues surrounding *Apprendi*'s application to federal sentencing are limited to the Sentencing Guidelines. In fact, those issues equally encompass the statute under which the Guidelines were promulgated – the Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 (codified as amended at 18 U.S.C. 3551 et seq.) (see, *e.g.*, *United States* v. *Mueffleman*, 2004 U.S. Dist. LEXIS 14114, at *48 (D. Mass. July 26, 2004)) – as well as Federal Rule of Criminal Procedure 32(i), which calls for judicial factfinding (see, *e.g.*, *United States* v. *Ameline*, 2004 U.S. App. LEXIS 15031, at *33 (CA9 July 21, 2004) (holding Rule 32 unconstitutional)).

We accordingly recommend reframing the second question proposed by the government as follows:

> If the answer to the first question is "yes," the following question is presented: What role do the Sentencing Reform Act, the Sentencing Guidelines, and Federal Rule of Criminal Procedure 32 continue to play in federal criminal sentencing?

II. The Court Should Grant Certiorari in *Booker* or in No. 04-5263, *Pineiro* v. *United States*, Should Also Grant Certiorari in No. 04-5272, *Bijou* v. *United States*, and Should Deny the Petition for Certiorari Before Judgment in *Fanfan*.

Amici submit that it would be appropriate for the Court to grant dual petitions for certiorari relating to the application of *Apprendi* to the Sentencing Guidelines. Despite the best efforts of counsel, it is possible that an unanticipated procedural obstacle will later become apparent that renders one case an inappropriate vehicle to resolve the questions

presented. The issues now confronting the lower courts are too important to defer their resolution until another petition for certiorari can be granted and the case decided on the merits. For that very reason, however, the Court should make every effort at the outset to select both cases carefully, granting certiorari in those petitions that are most likely to provide clear guidance to the lower courts. In our view, assuming that the Court grants the government's petition in No. 04-104, *Booker* v. *United States*, the second case the Court should agree to hear is No. 04-5272, *Bijou* v. *United States*. Accordingly, the Court should deny the government's petition for certiorari before judgment in No. 04-105, *Fanfan* v. *United States*.

1. We specifically recommend that the Court grant certiorari in one case in addition to *Booker* because *Booker* presents a number of potential procedural complications. Indeed, the government's petition hints at "possible later impediments to review." *Booker* Pet. 25. The defendant-respondent in *Booker* did not assert that his sentence violated the Fifth and Sixth Amendments in either the district court or the Seventh Circuit; instead, the court of appeals raised the issue *sua sponte*. And the fact that the defendant "gave a written statement to the police in which he admitted selling" the very drugs that were the basis for the judge's sentence (*Booker* Pet. 2) could lead to an assertion by the government that the error was harmless.[5]

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[5] Indeed, the government might even claim that Booker's "admission" to the police counts as an "admission" of the fact under *Blakely* for sentencing purposes. To be clear, our view is that none of these objections has merit in the circumstances of *Booker*, albeit for reasons that this Court would have to reach before deciding the merits of the Sixth Amendment question. The defendant faced a wall of circuit precedent that categorically precluded the successful assertion of an *Apprendi* challenge to his sentence in the district court or court of appeals. See, *e.g.*, *United States* v. *Nance*, 236 F.3d 820, 824-25 (CA7 2000). Moreover, the

The government has suggested that the Court exercise its inherent authority to "overlook[]" all such procedural obstacles. See *Booker* Pet. 23. That would be a substantial departure from the Court's usual practice, and the Court may conclude that the procedural concerns surrounding *Booker* are substantial enough that certiorari should instead be granted in another similar case, No. 04-5263, *Pineiro* v. *United States* (petition for certiorari docketed July 14, 2004). In *Pineiro*, the Fifth Circuit held that *Apprendi* does not apply to the Guidelines, notwithstanding *Blakely*, at least not until this Court expressly holds otherwise. 2004 U.S. App. LEXIS 14259, at *2 (CA5 2004). A jury found the defendant in that case guilty of conspiracy to distribute marijuana and cocaine, but made a special finding that the conspiracy involved significantly smaller amounts of drugs than the government alleged. The sentencing judge nonetheless increased the defendant's sentence considerably after finding by a preponderance of the evidence that the defendant had possessed "amounts of drugs far greater than the amounts found by the jury." *Id.* at *5. In the district court, the defendant preserved an *Apprendi* objection to the district judge's fact-finding with respect to his base offense level (albeit arguably not to other sentencing enhancements). He also preserved all his *Apprendi* objections before the Fifth Circuit. Furthermore, because the jury acquitted the defendant of the very conduct that the judge, in setting a

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government has impliedly waived reliance on each of the described procedural objections twice – both in the court of appeals and subsequently in its petition for certiorari. Our view is moreover that such an *Apprendi* error can never be "harmless" because the defendant is deprived, *inter alia*, of his right to a grand jury indictment, although that issue is itself the subject of a substantial circuit split that could cloud the disposition of *Booker*. See Br. of the U.S. in Opposition, *Suarez* v. *United States*, Nos. 02-10547, 02-10319 (acknowledging the conflict), cert. denied, 124 S. Ct. 70 (2003).

sentence, subsequently found he had committed, there can be no allegation that the *Apprendi* error in *Pineiro* was harmless.

2. In our view, the appropriate companion case to *Booker* or *Pineiro* is No. 04-5272, *Bijou* v. *United States* (petition for certiorari docketed July 19, 2004).[6] In *Bijou*, the government indicted the defendant on two counts of possession of a firearm by a convicted felon and one count of possession of ammunition by a convicted felon, along with a charge of possessing drugs and one of using a firearm in connection with that drug felony. The defendant pled guilty to one felon-in-possession charge and went to jury trial on the remaining charges. After the district court excluded the drug evidence because it was "improbable" that the drugs introduced by the government consisted of "the same item" that had been seized from Bijou's apartment, the government dismissed the firearm-use and drug charges, and Bijou pled guilty to the two remaining felon-in-possession counts.

At sentencing, the judge nonetheless found by a preponderance of the evidence that Bijou had committed the very drug offense set forth in the previously dismissed charge. The judge deemed that offense to require a cross-reference for the purpose of sentencing under the Guidelines, resulting in Bijou's being sentenced under the drug guideline rather than the firearms guideline. According to the presentence investigation report, the base offense level to which Bijou was subject under the felon-in-possession guideline, U.S.S.G. 2K2.1, was 24. With a two-level reduction for Bijou's acceptance of responsibility, the guideline range for the firearm and ammunition charges was 84 to 105 months. But at sentencing, pursuant to the cross-reference for a defendant who uses a firearm "in connection with the commission * * * of another offense," *id.* 2K2.1(c)(1), the judge used the same

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[6] We are authorized to represent that counsel for the petitioner in *Bijou* supports review on both of the questions as we have framed them, *supra*.

drug evidence he had excluded as "very unconvincing" to increase the adjusted offense level (after the adjustment for acceptance of responsibility) to 32, producing a range of 210 to 262 months. In other words, on the basis of facts neither proved to a jury beyond a reasonable doubt nor admitted by the defendant, Bijou's maximum sentence was more than doubled.

Bijou timely objected to the court's imposition of a higher sentence based on judicial fact-finding as violative of *Apprendi*. He then appealed the denial of that objection to the Fourth Circuit, which rejected the claim based on settled circuit precedent. See *United States* v. *Bijou*, 92 Fed. Appx. 966 (2004) (unpublished opinion). *Bijou* thus presents a perfectly "clean" vehicle for deciding the questions presented because the constitutional issue was properly preserved throughout the proceedings and because there cannot possibly be an assertion of harmless error.

Bijou also has a considerable advantage over any of the other petitions pending before this Court in that it arises from a guilty plea. As the government points out (see *Booker* Pet. 20), some ninety-seven percent of federal criminal charges are resolved by plea. See also *Mitchell* v. *United States*, 526 U.S. 314, 324-25 (1999) (citing similar statistics). The lower courts, prosecutors, and defendants would accordingly benefit most from a ruling by this Court that addresses the application of *Apprendi* and *Blakely* in that context. For this Court instead to grant review only in cases that resulted in jury verdicts would potentially leave unresolved the most important aspects of *Apprendi*'s application to federal criminal procedure.

To be sure, *Bijou* has the marginal disadvantage that the Fourth Circuit's opinion in that case predates this Court's decision in *Blakely*. Ideally, the Court would grant review in a case with facts similar to those in *Bijou* and in which the court of appeals had addressed the effect of *Blakely*. But we have not been able to identify such a case now pending before

the Court. Just as the government notes that it makes no difference that the Seventh Circuit did not consider the "remedial" question in *Booker*, in our view, the numerous lower court opinions already addressing *Blakely*'s applicability to the Guidelines are an acceptable substitute for such an opinion in *Bijou* itself.

3. In our view, *Bijou* is more appropriate than *Fanfan* as a companion case to *Booker* or *Pineiro*. *Fanfan*'s principal flaw is that it has been brought to this Court by way of a petition for a writ of certiorari before judgment, a procedure that (like the Second Circuit's attempted certification of questions in *United States* v. *Penaranda*, 2004 WL 1551369 (July 12, 2004) (en banc), certification docketed, No. 04-59 (July 13, 2004)), this Court has traditionally disfavored. If history is any guide, the Court views that fact alone as sufficient to justify denial of review.[7]

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[7] The government suggests that after resolving *Blakely*-related questions in other cases, the "Court could dispose of *Penaranda* as appropriate," as in *Iran National Airlines Corp.* v. *Maschalk Co.*, 453 U.S. 919 (1981). *Booker* Pet. 27. After deciding *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981), the Court in *Iran National Airlines* addressed questions certified by the Second Circuit by issuing two "yes or no" answers and by dismissing a third question. 453 U.S. at 919. Three Justices dissented, urging the Court to "dismiss the certificate": "Having rendered an opinion on the subject of those questions, we should not answer them in monosyllables nor attempt a syllabus of a portion of the Court's opinion." *Ibid.* (Powell, J. dissenting) (citing the dismissals in *Foley* v. *Carter*, 449 U.S. 1073 (1981), and *United States* v. *Will*, 449 U.S. 200 (1980)). The greater complexity of the certified questions presented by *Penaranda* counsels more strongly in favor of dismissing the certificate and allowing that case to proceed through the normal appellate processes. In addition, the failure to dismiss the certificate despite the absence of any compelling need to consider it could convey the impression that this Court favors the certification process. Indeed, it could encourage the courts of appeals to certify other *Apprendi*-related questions to this Court in

Nor does any feature of *Fanfan* make it a compelling vehicle. The district court did not issue an opinion and did not even receive briefing from the parties before orally announcing a sentence. Nor, contrary to the government's argument, did the district court suggest that in future cases it would sentence defendants to the minimum base level consistent with the jury's finding of guilt or innocence. Rather, the district court in *Fanfan* held that the jury's pre-*Blakely* verdict was controlling in that case only, presumably because the re-indictment of the defendant and subsequent use of a sentencing jury to find a greater quantity of drugs would violate double jeopardy. See *Fanfan* Pet. App. 11a ("I point out that I'm not making any blanket decision about the federal guidelines. I'm dealing *solely* with drug quantity and with role enhancement *in the context of the case that went to a jury verdict before a jury trial.*" (emphases added)). The government's petition in *Fanfan* thus does not satisfy the "strict" (*Fanfan* Pet. 8) standards for granting certiorari before judgment because several pending petitions for review of the rulings of the courts of appeals provide superior suitable vehicles for deciding the questions presented.

The cases cited by the government in which this Court has granted certiorari before judgment (see *Fanfan* Pet. 9) are not analogous. In the rare instances that the Court has granted certiorari before judgment "where cases presenting similar issues had already been accepted for review" (*id.* at 9 n.*), each case presented distinct issues meriting this Court's attention. Thus, in the only such instance since the 1950s, the Court granted certiorari before judgment in *Gratz* v. *Bollinger*, 539 U.S. 244 (2003), because that case concerned

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the short term. The Court has not accepted a case through the certification process since *Iran National Airlines*; its consistent practice of dismissal could be undermined by its agreement to review *Penaranda* now.

an affirmative action policy with important differences from the program at issue in *Grutter* v. *Bollinger*, 539 U.S. 306 (2003). When such a special circumstance has been lacking, the Court has denied certiorari before judgment. See, *e.g.*, *United States* v. *Players Int'l Inc.*, 525 U.S. 1094 (1999) (denying government's petition).

In certain other instances, this Court has granted certiorari before judgment when it was necessary because no decision of a court of appeals presented an available vehicle to decide the (nonetheless pressing) question presented. For example, when this Court granted certiorari before judgment in *Mistretta* v. *United States*, which the government cites here, no court of appeals had yet passed on the constitutionality of the Guidelines. See *Mistretta*, 488 U.S. 361, 371 n.6 (1989). (The "district court" in *Mistretta*, moreover, was a special seven-judge sentencing panel. See 682 F. Supp. 1033 (W.D. Mo. 1988).) That circumstance is not present here.

4. We also recommend against treating *Booker* and *Fanfan* as companion cases because both share a feature that is likely to frustrate this Court's ability to provide adequate guidance to the lower courts, prosecutors, and defendants.

Booker and *Fanfan* both arise from drug convictions. To be sure, drug cases are very common in the federal criminal system, and we agree that it would be appropriate for the Court to grant certiorari in *one* such case. But the federal drug laws comprise, by far, the nation's most complicated sentencing scheme, a scheme that has given rise to an extraordinary volume of litigation and an array of disagreements regarding the meaning of the applicable guidelines and statutes. Unlike most other criminal statutes, which simply state a statutory maximum and then leave exact sentencing calculations up to the Guidelines, the principal federal drug statute (21 U.S.C. 841) includes a series of escalating statutory maximums and minimums. The extra complications inherent in this statutory scheme make cases

that arise under it ill-suited vehicles to resolve the threshold question of whether *Apprendi* applies to the Sentencing Guidelines.

Section 841's graduated penalty scheme is essentially a statutory guideline regime that functions anterior to the federal Sentencing Guidelines. A presumptive guideline range can, according to some circuits, be trumped by judicial factfinding triggering a statutory mandatory minimum. Thus, Judge Easterbrook's dissent in *Booker* rests on his assumption (echoed by the government here) that "Congress established the statutory maximum penalties for drug offenses in 21 U.S.C. 841(b)" and that the Sentencing Guidelines "affect sentencing only after the degree of the offense has been established by the jury." *Booker* Pet. 7 (citing *Booker* Pet. App. 18a, 22a). While it would certainly be worthwhile for this Court to resolve Section 841's ambiguities post-*Blakely*, the statute's unique and complex provisions present a poor test case for the constitutionality of the full gamut of Guideline provisions. By contrast, although *Bijou* involves the consideration of drugs as relevant conduct, it does not implicate any of these issues because the underlying conviction was on firearms charges; the dispute is not over the nuances of drug quantity and Section 841(b), but rather whether the drug conduct may be considered at all in sentencing for the firearms offense.

Drug quantity calculations also do not represent some of the most egregious *Apprendi* violations under the Guidelines. The defendants in both *Fanfan* and *Booker* were convicted of distributing or conspiring to distribute cocaine, and the question before the judge was simply "how much?" In contrast, the defendant in *Bijou* was literally sentenced for a different crime from the one to which he had pled guilty. The Sentencing Guidelines mandated this result because the sentence for possession of cocaine was "greater than that determined" for illegally possessing a firearm. U.S.S.G. 2K2.1(c)(1)(A). In *Blakely* this Court was concerned with precisely this sort of conviction by judicial inquisition. "The

jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Blakely*, slip op. at 10 (emphasis in original).

Finally, cases involving the application of *Apprendi* to drug quantity implicate another significant controversy that *Bijou* avoids: the circuit conflict on the question whether drug quantity is *statutorily* defined as an element of the Section 841 offense. If it is, then it is not necessary to apply *Apprendi*'s constitutional rule in order to reach the conclusion that quantity must be charged in the indictment and determined by the jury beyond a reasonable doubt. Review only of drug cases might fail to resolve the crucial issues arising after *Blakely* because statutory construction could avoid the constitutional question. The D.C. Circuit reached just such a conclusion in *United States* v. *Graham*, 317 F.3d 262 (CADC 2003), in which it applied its settled rule that drug quantity is an offense element under Section 841(b) to strike down the supervised release portion of the defendant's sentence. It did so on purely statutory grounds; indeed, the court specifically held that the supervised release sentence did *not* violate *Apprendi*'s constitutional rule because, although the judge's drug quantity finding triggered an increased statutory minimum period of supervised release, that period did not exceed the statutory *maximum* triggered by the jury's verdict alone. See also *United States* v. *Vazquez*, 271 F.3d 93, 107-16 (CA3 2001) (Becker, C.J., concurring) (reviewing text, structure, and legislative history of Section 841 and concluding that drug quantity is an offense element).

Graham conflicts with the holdings of the First, Seventh, and Eleventh Circuits that Section 841(b) statutorily defines drug quantity as a sentencing factor and not an offense element, such that it must be determined by a jury only when *Apprendi*'s constitutional rule is implicated. See *United States* v. *Goodine*, 326 F.3d 26, 28-32 (CA1 2003), cert.

denied, 124 S. Ct. 1600 (2004); *United States* v. *Smith*, 308 F.3d 726, 740-41 (CA7 2002); *United States* v. *Sanchez*, 269 F.3d 1250, 1267-70 (CA11 2001). The Second, Fifth, and Sixth Circuits have agreed with the D.C. Circuit that drug quantity is a statutory offense element but have inexplicably applied that holding only when the *Apprendi* rule would be violated by not doing so. See *United States* v. *Darwich*, 337 F.3d 645, 655 (CA6 2003); *United States* v. *Mendoza-Gonzalez*, 318 F.3d 663, 673 (CA5), cert. denied, 123 S. Ct. 2114 (2003); *United States* v. *Thomas*, 274 F.3d 655, 663-64 (CA2 2001) (en banc). This circuit conflict may or may not persist, depending on how this Court ultimately applies *Apprendi* and *Blakely* in the federal Guidelines context. If it does persist, it will eventually merit this Court's resolution. See generally *Goodine* Pet., No. 03-596 (Oct. 16, 2003); *Goodine* Br. of *Amicus Curiae* NACDL et al. (Feb. 6, 2004). But the more pressing questions demanding immediate resolution are the constitutional issues emerging from *Blakely*, and this Court would thus be well served by reviewing a case in which those issues are not clouded by the existence of complicated, overlapping questions of statutory interpretation.

CONCLUSION

For the foregoing reasons, the Court should reframe the questions presented in the manner suggested above, grant certiorari in *Booker* or in *Pineiro*, also grant certiorari in *Bijou*, and deny the petition for certiorari before judgment in *Fanfan*.

Respectfully submitted,

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(7) (6)

FILED
1 2004
CLERK

Nos. 04-104 and 04-105

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

FREDDIE J. BOOKER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, PETITIONER

v.

DUCAN FANFAN

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.

2. If the answer to the first question is "yes," the following question is presented: whether, in a case in which the Guidelines would require the court to find a sentence-enhancing fact, the Guidelines as a whole would be inapplicable, as a matter of severability analysis, such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the offense of conviction.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional, statutory, and guidelines provisions involved	2
Statement	2
1. The Federal Sentencing Guidelines system	2
2. Constitutional challenges to the Guidelines	6
3. The present controversy	9
Summary of argument	12
Argument:	
I. *Blakely* does not apply to the United States Sentencing Guidelines	14
A. The requirements of *Apprendi* apply to a fact that increases the statutory maximum sentence	14
B. A fact that increases a defendant's offense level under the Sentencing Guidelines does not increase the statutory maximum sentence	20
1. The functions performed by the Sentencing Commission are those that have historically been performed by sentencing judges	20
2. The Sentencing Guidelines bear no resemblance to a graduated statutory offense with different "degrees" of seriousness	26

Table of Contents—Continued: Page

C. This Court has consistently recognized the distinction between a fact that increases the statutory maximum and a fact that increases a defendant's offense level under the Guidelines 32
D. If *Blakely* would require that a Guidelines range be treated as a statutory maximum, that aspect of *Blakely* should be reconsidered 39
II. If *Blakely* is held to apply to the Guidelines, the Guidelines cannot be applied as binding sentencing rules in cases where jury factfinding would be required 43
A. Severability analysis turns on the intent of the legislature and the Commission, and on whether the severed provisions are operable as a law 44
B. Congress would not have intended the Guidelines system to be administered with a requirement of jury findings for sentence-enhancing facts 47
C. Administering jury factfinding under the Guidelines would require procedural innovation far greater than is permissible 59
D. The conversion of the Sentencing Guidelines into "elements" would raise serious constitutional questions 63
E. The appropriate remedy would be to hold the Guidelines as a whole inapplicable in a case in which the Guidelines would require the court to find a sentence-enhancing fact 66
Conclusion 70

TABLE OF AUTHORITIES

Cases: Page

Addison v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944) 47
Agostini v. *Felton*, 521 U.S. 203 (1997) 41
Alaska Airlines v. *Brock*, 480 U.S. 679 (1987) 45, 59-60, 63, 68
Apprendi v. *New Jersey*, 530 U.S. 466 (2000) ..... *passim*
Blakely v. *Washington*, 124 S. Ct. 2531 (2004) ..... *passim*
Brown v. *Ohio*, 432 U.S. 161 (1977) 35
Buckley v. *Valeo*, 424 U.S. 1 (1976) 45
Edward J. DeBartolo Corp. v. *Florida Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (188) 63-64
Edwards v. *United States*, 523 U.S. 511 (1998) 36, 37
Federal Power Comm'n v. *Idaho Power Co.*, 344 U.S. 17 (1952) 47
Harmelin v. *Michigan*, 501 U.S. 957 (1991) 41
Harris v. *United States*, 536 U.S. 545 (2002) 38, 39, 40, 41
Hill v. *Wallace*, 259 U.S. 44 (1922) 50, 60
Jackson v. *Virginia*, 443 U.S. 307 (1979) 68
Jones v. *United States*, 526 U.S. 227 (1999) 64
K Mart Corp. v. *Cartier, Inc.*, 486 U.S. 281 (1988) 46
Koon v. *United States*, 518 U.S. 81 (1996) 48
Miller v. *Florida*, 482 U.S. 423 (1987) 25
Minnesota v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) 44, 50
Mistretta v. *United States*, 488 U.S. 361 (1989) ..... *passim*
Monge v. *California*, 524 U.S. 721 (1998) 40, 57
Nichols v. *United States*, 511 U.S. 738 (1994) 21
Patterson v. *New York*, 432 U.S. 197 (1977) 51
Payne v. *Tennessee*, 501 U.S. 808 (1991) 41
Pennsylvania ex rel. Sullivan v. *Ashe*, 302 U.S. 51 (1937) 43

Cases—Continued: Page

Railroad Ret. Bd. v. *Alton R.R.*, 295 U.S. 330 (1935) 45
Ring v. *Arizona*, 536 U.S. 584 (2002) 8, 14, 16, 17
Rogers v. *Tennessee*, 532 U.S. 451 (2001) 25
Sattazahn v. *Pennsylvania*, 537 U.S. 101 (2003) 18
Schmuck v. *United States*, 489 U.S. 705 (1989) 62
Shepard v. *United States*, 257 F.2d 293 (6th Cir. 1958) 3
Staples v. *United States*, 511 U.S. 600 (1994) 65
Stinson v. *United States*, 508 U.S. 36 (1993) 25
Tuan Anh Nguyen v. *INS*, 533 U.S. 53 (2001) 45
United States v. *Armstrong*, 517 U.S. 456 (1996) 62
United States v. *Banks*, 340 F.3d 683 (8th Cir. 2003) 9
United States v. *Bell*, 991 F.2d 1445 (8th Cir. 1993) 25
United States v. *Caba*, 241 F.3d 98 (1st Cir. 2001) 9
United States v. *Campbell*, 259 F.3d 293 (4th Cir. 2001) 28
United States v. *Cannady*, 283 F.3d 641 (4th Cir.), cert. denied, 537 U.S 936 (2002) 9
United States v. *Casas*, 356 F.3d 104 (1st Cir.), cert. denied, 124 S. Ct. 2405 (2004) 8
United States v. *Cotton*,. 535 U.S. 625 (2002) 58
United States v. *Croxford*, 324 F. Supp. 2d 1230 (D. Utah 2004) 54
United States v. *DiFrancesco*, 449 U.S. 117 (1980) 68
United States v. *Donelson*, 695 F.2d 583 (D.C. Cir. 1982) 36
United States v. *Dunnigan*, 507 U.S. 87 (1993) 7, 33, 56
United States v. *Einstman*, No. 04 CR. 97 (CM), 2004 WL 1576622 (S.D.N.Y. July 14, 2004) 53

Cases—Continued: Page

United States v. *Emmenegger*, No. 04 CR. 334 (GEL), 2004 WL 1752599 (S.D.N.Y. Aug. 4, 2004) 28, 31, 33, 38
United States v. *Floyd*, 343 F.3d 363 (5th Cir. 2003), cert. denied, 124 S. Ct. 2190 (2004) 9
United States v. *Friedman*, 300 F.3d 111 (2d Cir. 2002), cert. denied, 538 U.S. 981 (2003) 28
United States v. *Gaudin*, 515 U.S. 506 (1995) 15
United States v. *Grayson*, 438 U.S. 41 (1978) 2
United States v. *Hudson*, 11 U.S. (7 Cranch) 32 (1812) 65
United States v. *Jackson*, 390 U.S. 570 (1968) 60, 61
United States v. *Kinter*, 235 F.3d 192 (4th Cir. 2000), cert. denied, 532 U.S. 937 (2001) 9, 22
United States v. *Koch*, No. 02-6278, 2004 WL 1899930 (6th Cir. Aug. 26, 2004) 23, 31, 33
United States v. *Longoria*, 298 F.3d 367 (5th Cir.), cert. denied, 537 U.S. 1038 (2002) 28
United States v. *Luciano*, 311 F.3d 146 (2d Cir. 2002), cert. denied, 123 S. Ct. 1185 (2004) 8-9
United States v. *Martin Linen Supply Co.*, 430 U.S. 564 (1977) 48, 68
United States v. *McCulligan*, 256 F.3d 97 (3d Cir. 2001) 28
United States v. *Mendez-Zamora*, 296 F.3d 1013 (10th Cir.), cert. denied, 537 U.S. 1063 (2002) 9
United States v. *Merritt*, 361 F.3d 1005 (7th Cir. 2004), petition for cert. pending, No. 03-10979 (filed June 18, 2004) 9
United States v. *Ochoa*, 311 F.3d 1133 (9th Cir. 2002) 9
United States v. *Ortiz*, 318 F.3d 1030 (11th Cir. 2003) 9
United States v. *Parmelee*, 319 F.3d 583 (3d Cir. 2003) 9

Cases—Continued: Page

United States v. *Pettigrew*, 346 F.3d 1139 (D.C. Cir. 2003) 8
United States v. *Pineiro*, 377 F.3d 464 (5th Cir. 2004), petition for cert. pending, No. 04-5263 (filed July 14, 2004) 18, 31, 32, 38
United States v. *Tarwater*, 308 F.3d 494 (6th Cir. 2002) 9
United States v. *Watts*, 519 U.S. 148 (1997) 7, 30, 35, 36
United States v. *Williams*, 343 F.3d 423 (5th Cir.), cert. denied, 123 S. Ct. 966 (2003) 28
United States v. *Wright*, 873 F.2d 437 (1st Cir. 1989) 30, 36
Williams v. *New York*, 337 U.S. 241 (1949) 16, 26, 36, 57
Williams v. *Oklahoma*, 358 U.S. 576 (1959) 34
Witte v. *United States*, 515 U.S. 389 (1995) 6, 34, 35, 36

Constitution, statutes, rules and regulations:

U.S. Const.:
Art. I:
§ 9, Cl. 3 (Ex Post Facto Clause) 25
§ 10, Cl. 1 (Ex Post Facto Clause) 25
Amend. V 14
Double Jeopardy Clause 7, 35, 48
Amend. VI ..... *passim*
Amend. XIV (Due Process Clause) 8, 36
Act of Oct. 30, 1995, Pub. L. No. 104-38, § 1, 109 Stat. 334 24
Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Tit. VII, Subtit. C, § 7103(a)(7), 102 Stat. 4417 48
Federal Judiciary Protection Act of 2002, Pub. L. No. 107-273, Div. C, Tit. I, § 11008(b), 116 Stat. 1818 27

Statutes, rules and regulations—Continued: Page

PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650:
§ 401(b), 117 Stat. 668-669 25
§ 401(g), 117 Stat. 671-672 25
§ 401(i), 117 Stat. 672-673 25
Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (18 U.S.C. 3551 *et seq.*) 3, 4, 20
18 U.S.C. 3553(a) 67
18 U.S.C. 3553(a)(1) 67
18 U.S.C. 3553(a)(2) 67
18 U.S.C. 3553(a)(4) 67
18 U.S.C. 3553(a)(5) 67
18 U.S.C. 3553(a)(6) 67
18 U.S.C. 3553(b) 5, 25, 68
18 U.S.C. 3582(a) 67
18 U.S.C. 3593(b) 61
18 U.S.C. 3624(a) 5
18 U.S.C. 3624(b) 5
18 U.S.C. 3742(a) 5, 58
18 U.S.C. 3742(b) 5, 48
18 U.S.C. 3742(d) (Supp. II 1984) 5
18 U.S.C. 3742(e) 5
18 U.S.C. 3742(e)(4) 48
28 U.S.C. 991 4
28 U.S.C. 991(a) 20
28 U.S.C. 991(b)(1)(B) 49
28 U.S.C. 994 4
28 U.S.C. 994 note 25
28 U.S.C. 994(a) 5
28 U.S.C. 994(a)(1) 47, 60
28 U.S.C. 994(b) 5
28 U.S.C. 994(b)(1) 65
28 U.S.C. 994(c)(2) 47, 50
28 U.S.C. 994(c)(3) 47
28 U.S.C. 994(d)(9) 47
28 U.S.C. 994(m) 4, 21, 49, 65
28 U.S.C. 994(p) 25

Statutes, rules and regulations—Continued:	Page
28 U.S.C. 994(r)	66
28 U.S.C. 995(a)(1)	4
Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Tit. XXVIII, § 280003, 108 Stat. 2096	53
18 U.S.C. 111	27, 28
18 U.S.C. 242	28
19 U.S.C. 924	39
18 U.S.C. 924(c)(1)(A)(ii)	29
18 U.S.C. 1952	28
18 U.S.C. 3661	62
21 U.S.C. 841(a)(1)	10, 11
21 U.S.C. 841(b)(1)	27
21 U.S.C. 841(b)(1)-(3)	28, 37
21 U.S.C. 841(b)(1)(A)(iii)	10
21 U.S.C. 841(b)(1)(B)(ii)	11
21 U.S.C. 841(b)(1)(C)	10, 11
21 U.S.C. 846	11, 36
28 U.S.C. 334	23
Sentencing Reform Act of 1981, Wash. Rev. Code	
§§ 9.94A *et seq.* (2000)	9, 17, 20
§ 9.94A.125 (2000)	27
§ 9.94A.310 (2000)	27
§ 9.94A.350 (2000)	27
§ 9.94A.360 (2000)	27
§ 9.94A.370 (2000)	27
§ 9.94A.390 (2000)	27
Fed. R. Crim. P.:	
Rule 7(c)(1)	61
Rule 16(a)(1)(C) (1994)	62
Rule 16(a)(1)(F)(iii)	62
Rule 31(c)(1)	62
Rule 32(c)	60
Rule 32(d)	60
Rule 32(i)(3)(B)	60
Fed. R. Evid. 1101(d)(3)	62

Regulations—Continued:	Page
United States Sentencing Guidelines:	
Ch. 1:	
Pt. A	57, 58
§ 1A1 note	57
§ 1A1.4(a)	57, 58
Pt. B:	
§ 1B1.1(a)	5, 31
§ 1B1.1(b)	5, 31
§ 1B1.1(c)	5-6, 31
§ 1B1.1(d)	6, 31
§ 1B1.1(e)	6, 31
§ 1B1.1(f)	6, 31
§ 1B1.1(g)	6, 31
§ 1B1.1(h)	6
§ 1B1.1(i)	6
§ 1B1.2(a)	6, 31
§ 1B1.2(b)	6, 49
§ 1B1.2, comment. (n.2)	49
§ 1B1.3	6, 57
§ 1B1.3(a)	30
§ 1B1.3(a)(1)(A)	30
§ 1B1.3(a)(1)(B)	30
§ 1B1.3(a)(2)	30
§ 1B1.3(a)(i)	32
§ 1B1.3(a)(iii)	32
§ 1B1.3, comment	57
§ 1B1.11(b)(2)	50
Ch. 2	5, 32
Pt. A:	
§ 2A5.2(a)	32
Pt. B:	
§ 2B1.1	58
§ 2B1.1(a)	52
§ 2B1.1(b)	29
§ 2B1.1(b)(1)	52
§ 2B1.1(b)(5)	51
§ 2B1.1(c)	32
§ 2B1.5(b)(4)	51

Regulations—Continued: Page

Pt. C:
§ 2C1.1(c) 51
Pt. D:
§ 2D1.1 ..... 29, 34, 58
§ 2D1.1(b)(6) 32
Pt. K:
§ 2K2.4, comment. (n.1) (Nov. 2001) 39
Pt. Q:
§ 2Q1.6(a)(3) 51
Pt. S:
§ 2S1.1(b)(1) 51
Pt. T:
§ 2T1.9(b)(2) 51
Ch. 3:
Pt. A 5
§ 3A1.1(a) 29, 53
§ 3A1.1(b) 29, 52
§ 3A1.2 29
§ 3A1.3 29
§ 3A1.4 29
Pt. B 5
§ 3B1.1 29
§ 3B1.2 32
§ 3B1.3 29
§ 3B1.4 29
§ 3B1.5 29
Pt. C 5, 6, 58
§ 3C1.1 ..... 29, 33, 56
§ 3C1.2 29
Pt. D 6, 58
Pt. E 6
§ 3E1.1 ..... 32, 52, 62
Ch. 4:
Pt. A 6
Pt. B 6
§ 4B1.1 6

Regulations—Continued: Page

§ 4B1.3 6
§ 4B1.4(b) 6
§ 4B1.5(a)(1) 6
§ 4B1.5(b)(1) 6
Ch. 5:
Pt. A 5
Pt. G:
§ 5G1.1 37
§ 5G1.1(a) 9
Pt. K:
§ 5K2.0 56
Ch. 6:
§ 6A1.3 52
§ 6A1.3, comment. 52
§ 6A1.3(a) 49

Miscellaneous:

Appellate Review of Sentences, 32 F.R.D. 249 (1962) 3, 23
Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1 (1990) 57
121 Cong. Rec. 37,562-37,563 (1975) 3
Developments in the Law—Race and the Criminal Process, 101 Harv. L. Rev. 1473 (1988) 3
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National Comm'n on Reform of Federal Criminal Laws, Final Report (1971) 65

Miscellaneous—Continued: Page

Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 Nw. U.L. Rev. 1342 (1997) 58
S. Rep. No. 225, 98th Cong., 1st Sess. (1983) 3, 4, 5
S. 2699, 94th Cong, 1st Sess. (1975) 4
S. 1437, 95th Cong., 1st Sess. (1977) 4
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(1938) 3
(1939) 3
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FREDDIE J. BOOKER

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals in *United States* v. *Booker* (04-104 Pet. App. 1a-27a) is reported at 375 F.3d 508. The sentencing proceedings in *United States* v. *Fanfan* (04-105 Pet. App. 1a-13a) are unreported.

JURISDICTION

The judgment of the court of appeals in *United States* v. *Booker* was entered on July 9, 2004. The judgment of the district court in *United States* v. *Fanfan* was entered on June 30, 2004 (04-105 Pet. App. 16a-21a), the notice of appeal was filed on July 16, 2004 (*id.* at 26a), and the case was docketed in the court of appeals on July 19, 2004 (*id.* at 27a). The petitions for a writ of certiorari were filed on July 21,

2004, and were granted on August 2, 2004. The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and 2101(e).

CONSTITUTIONAL, STATUTORY, AND GUIDELINES PROVISIONS INVOLVED

The relevant constitutional, statutory, and Sentencing Guidelines provisions are set forth in appendices to the petitions. 04-104 Pet. App. 33a-68a; 04-105 Pet. App. 28a-63a.

STATEMENT

1. The Federal Sentencing Guidelines system

a. "From the beginning of the Republic, federal judges were entrusted with wide sentencing discretion." *Apprendi* v. *New Jersey*, 530 U.S. 466, 482 n.9 (2000) (quoting Kate Stith & José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 9-10 (1998)). "Statutes specified the penalties for crimes but nearly always gave the sentencing judge wide discretion to decide whether the offender should be incarcerated and for how long." *Mistretta* v. *United States*, 488 U.S. 361, 363 (1989). With the rise of rehabilitation as a goal of sentencing, some legislatures, including Congress, also adopted systems in which the actual period of imprisonment was left largely to parole boards and other officials outside of the courts. *United States* v. *Grayson*, 438 U.S. 41, 46-48 (1978); Parole Act, ch. 387, 36 Stat. 819 (1910). In the exercise of sentencing discretion, judges traditionally considered "aggravating and mitigating circumstances surrounding an offense" in order to determine the appropriate sentence within broad statutory limits. *United States* v. *Grayson*, 438 U.S. at 46. And as long as the sentence fell within the statutory range set by Congress, the sentence imposed by the district court as a matter of its discretion was given "virtually unconditional deference on appeal." *Mistretta*, 488 U.S. at 364.

Almost from its inception, wholly discretionary sentencing met with criticism, much of it severe, from commentators,[1] Attorneys General,[2] and federal judges.[3] The criticism focused on the gross disparities in the sentences imposed on similar offenders for similar offenses. This concern was later validated by empirical studies. See S. Rep. No. 225, 98th Cong., 1st Sess. 41-46 & nn.18-27 (1983) (Senate Report). Some studies suggested that disparities were not only arbitrary, in that sentences varied from circuit to circuit, district to district, and judge to judge, but also invidious, in that minority defendants were at times sentenced more harshly than similarly situated whites. See *Developments in the Law—Race and the Criminal Process*, 101 Harv. L. Rev. 1473, 1630-1632 & nn.35-44 (1988).

In his 1972 book, *Criminal Sentences: Law Without Order*, Judge Marvin E. Frankel of the Southern District of New York captured the thinking of many critics when he wrote that the "almost wholly unchecked and sweeping" discretion of sentencing judges was "terrifying and intolerable for a society that professes devotion to the rule of law." *Id.* at 5. Judge Frankel proposed an expert commission that would "prescribe in rules of general application the factors to be considered in individual sentences," and thereby bring a measure of uniformity, rationality, and fairness to sentencing. *Id.* at 123. Judge Frankel's ideas had a great influence on Congress. See, *e.g.*, 121 Cong. Rec. 37,562-37,563 (1975); Senate Report 37. In 1975, Senator Kennedy intro-

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[1] See, *e.g.*, *Long v. Short Sentences*, 20 Wash. L. Rep. 135 (1892); Charlton T. Lewis, *The Indeterminate Sentence*, 9 Yale L.J. 17 (1899).

[2] See United States Dep't of Justice, *Annual Report of the Attorney General of the United States* 6-7 (1938) (Att'y Gen. Cummings); *id.* at 6-7 (1939) (Att'y Gen. Murphy); *id.* at 5-7 (1940) (Att'y Gen. Jackson); *id.* at 4 (1941) (Att'y Gen. Biddle).

[3] See, *e.g.*, *Shepard* v. *United States*, 257 F.2d 293 (6th Cir. 1958) (Stewart, J.); Symposium, *Appellate Review of Sentences*, 32 F.R.D. 249 (1962).

duced a bill that authorized the appointment of a commission to promulgate sentencing guidelines. See S. 2699, 94th Cong., 1st Sess. (1975). Bills with similar provisions were introduced in each of the next three Congresses, see S. 1437, 95th Cong., 1st Sess. (1977); S. 1722, 96th Cong., 1st Sess. (1979); S. 1630, 97th Cong., 1st Sess. (1981), but did not become law because of disagreement over comprehensive criminal-code reform, which had also been under consideration during the same period. When sentencing reform was finally uncoupled from criminal-code reform, Congress passed the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987.

b. As this Court has described it, the Sentencing Reform Act was a response to what Congress viewed as "two 'unjustifi[ed]' and 'shameful' consequences" of the indeterminate-sentencing system. *Mistretta*, 488 U.S. at 366 (quoting Senate Report 38, 65). The first was "the great variation among sentences imposed by different judges upon similarly situated offenders." *Ibid.* The second was "the uncertainty as to the time the offender would spend in prison," because of the possibility of release on parole before the end of the term imposed by the judge. *Ibid.*

The Sentencing Reform Act has several components that further the goals of uniformity and certainty. First, the Act established the United States Sentencing Commission as an independent agency in the Judicial Branch, and directed it to promulgate guidelines to channel the discretion of sentencing judges. 28 U.S.C. 991, 994, and 995(a)(1). The Act provided instructions to the Commission, including that, as a starting point in developing guidelines, the Commission ascertain the average sentences imposed in particular categories of cases under the old system. 28 U.S.C. 994(m). Second, the Act made the guidelines binding on district courts, except when there is an aggravating or mitigating circumstance not adequately considered by the Commission, in which case a court is permitted to depart from the applicable guidelines range. 18 U.S.C. 3553(a) and (b). In no event, however, can a guidelines sentence be outside the statutory limits set by Congress. 28 U.S.C. 994(a) and (b). Third, the Act authorized defendants to appeal a sentence above the guidelines range, the government to appeal a sentence below the guidelines range, and either party to appeal an incorrect application of the guidelines. 18 U.S.C. 3742(a) and (b). In reviewing a guidelines sentence, appellate courts are required to accept the facts found by the sentencing judge, unless they are clearly erroneous. 18 U.S.C. 3742(d) (Supp. II 1984) (currently codified as amended at 18 U.S.C. 3742(e)). Finally, the Act abolished parole and required defendants to serve the entirety of their sentences, minus any credit for "good time." 18 U.S.C. 3624(a) and (b).

c. The Guidelines promulgated by the Commission took effect in 1987, and have been revised continually since. Consistent with Congress's expectation that they would be "sufficiently detailed and refined to reflect every important factor relevant to sentencing for each category of offense and each category of offender," Senate Report 169, the Guidelines set 258 different sentencing ranges based on the combination of an "offense level" for the crime (ranging from 1 to 43) and a "criminal history category" for the defendant (ranging from I to VI). See Guidelines Ch. 5 Pt. A (Sentencing Table).

Calculating a defendant's offense level requires a district court to take account of various characteristics of the offense and the offender. A court first determines the applicable Guideline and a "base offense level" from Chapter Two. See Guidelines § 1B1.1(a) and (b). It then adds or subtracts levels based on "specific offense characteristics" in Chapter Two and makes upward or downward "adjustments" under Parts A, B, and C of Chapter Three.[4] See *id.* § 1B1.1(b) and

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[4] Part A provides for an increase based on the status of the victim; Part B provides for an increase or decrease based on the defendant's role

(c). If there are multiple counts of conviction, this process is repeated for each count; the counts are then "grouped" under Part D of Chapter Three and the offense level is adjusted accordingly. See *id.* § 1B1.1(d). At this point, and regardless of the number of counts, the offense level is decreased under Part E of Chapter Three if the district court finds that the defendant has accepted responsibility for his crime. See *id.* § 1B1.1(e). After calculating the defendant's criminal history category under Part A of Chapter Four, the court makes any further adjustments to the offense level required by Part B of Chapter Four.[5] See *id.* § 1B1.1(f). Once the court determines the final offense level and criminal history category, it consults a Sentencing Table in the Guidelines manual that sets forth the range of punishment for the defendant. The court must select a sentence within that range unless it determines that an upward or downward departure is warranted. See *id.* § 1B1.1(g)-(i). In calculating the offense level, the district court is required at virtually every step to consider all of the defendant's "relevant conduct," as determined by the court, even if it is not part of the offense of conviction. See *id.* §§ 1B1.2(a) and (b), 1B1.3.

2. Constitutional challenges to the Guidelines

a. Two years after they took effect, this Court, with only a single Justice in dissent, upheld the Guidelines against multiple constitutional challenges in *Mistretta* v. *United States*, 488 U.S. 361 (1989). The defendant in *Mistretta* raised a non-delegation claim and three separation-of-powers

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in the offense; and Part C provides for an increase based on obstructive conduct.

[5] See Guidelines § 4B1.1 (increase for "career offender"); *id.* § 4B1.3 (increase where crime was part of pattern of criminal conduct "engaged in as a livelihood"); *id.* § 4B1.4(b) (increase for "armed career criminal"); *id.* § 4B1.5(a)(1) and (b)(1) (increase for "repeat and dangerous sex offender against minors").

claims, one of which was that, by virtue of the Commission's placement in the Judicial Branch, the judiciary had been given legislative authority. In rejecting that contention, see *id.* at 384-397, the Court emphasized the differences between the functions of Congress and those of the Commission. It relied, in particular, on the fact that the Guidelines do not "bind or regulate the primary conduct of the public" or give the judiciary "the legislative responsibility for establishing minimum and maximum penalties for every crime," but instead "do no more than fetter the discretion of sentencing judges to do what they have done for generations—impose sentences within the broad limits established by Congress." *Id.* at 396.

b. In four cases decided in the decade after *Mistretta*, this Court rejected other constitutional challenges to the Guidelines, approving, in each case, a sentence enhancement based on facts found by the sentencing judge. In *United States* v. *Dunnigan*, 507 U.S. 87 (1993), the Court unanimously held that an increase in the offense level based on the district court's finding of trial perjury does not violate a defendant's right to testify on his own behalf. In *Witte* v. *United States*, 515 U.S. 389 (1995), the Court held that, when the district court increases the offense level on the basis of an uncharged drug transaction, the Double Jeopardy Clause does not prohibit a subsequent prosecution for that transaction. In *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam), a summary reversal, the Court held that, when a defendant is found guilty of one drug transaction and acquitted of another, the Double Jeopardy Clause does not prevent the district court from increasing the offense level on the basis of the conduct underlying the acquitted charge, so long as it has been proved by a preponderance of the evidence. Finally, in *Edwards* v. *United States*, 523 U.S. 511 (1998), the Court unanimously upheld a Guidelines sentence where the judge had found that the object of a drug conspiracy was to distribute both cocaine and cocaine base, even

though the jury had not specified which drug underlay its verdict. The Court held that the absence of a jury finding on that issue was legally unproblematic, because the Guidelines sentences imposed were below the statutory maximum for a cocaine-only conspiracy.

c. Two years after its decision in *Edwards*, the Court decided *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). The defendant in *Apprendi* pleaded guilty to an offense with a statutory maximum prison term of ten years, unless it was carried out with a biased purpose, in which case the statutory maximum (under a different statute) was 20 years. After making a finding of biased purpose, the trial court imposed a sentence of 12 years. This Court held that the sentence violated the Due Process Clause and the Sixth Amendment, because it was inconsistent with the principle that, other than the fact of a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. Two years later, the Court applied *Apprendi* in *Ring* v. *Arizona*, 536 U.S. 584 (2002), which held Arizona's death-penalty statute unconstitutional insofar as it permitted the sentencing judge, rather than the jury, to find the aggravating circumstances that made a defendant found guilty of first-degree murder eligible for the death penalty.

After this Court's decision in *Apprendi*, and indeed after its decision in *Ring*, every one of the twelve courts of appeals with criminal jurisdiction held that the Sixth Amendment does *not* require facts that increase a defendant's Guidelines offense level to be found by the jury, and that judicial fact-finding in the application of the Guidelines is therefore constitutional.[6] The appellate decisions reasoned

[6] See, *e.g.*, *United States* v. *Pettigrew*, 346 F.3d 1139, 1147 n.18 (D.C. Cir. 2003); *United States* v. *Casas*, 356 F.3d 104, 128 (1st Cir.), cert. denied, 124 S. Ct. 2405 (2004); *United States* v. *Luciano*, 311 F.3d 146, 153 (2d Cir. 2002), cert. denied, 124 S. Ct. 1185 (2004); *United States* v. *Parmelee*, 319 F.3d 583, 592 (3d Cir. 2003); *United States* v. *Cannady*, 283 F.3d 641, 649 & n.7 (4th Cir.), cert. denied, 537 U.S. 936 (2002); *United States* v. *Floyd*, 343 F.3d 363, 372 (5th Cir. 2003), cert. denied, 124 S. Ct. 2190 (2004); *United States* v. *Tarwater*, 308 F.3d 494, 517 (6th Cir. 2002); *United States* v. *Merritt*, 361 F.3d 1005, 1015 (7th Cir. 2004), petition for cert. pending, No. 03-10979 (filed June 18, 2004); *United States* v. *Banks*, 340 F.3d 683, 684-685 (8th Cir. 2003); *United States* v. *Ochoa*, 311 F.3d 1133, 1134-1136 (9th Cir. 2002); *United States* v. *Mendez-Zamora*, 296 F.3d 1013, 1020 (10th Cir.), cert. denied, 537 U.S. 1063 (2002); *United States* v. *Ortiz*, 318 F.3d 1030, 1039 (11th Cir. 2003).

that "the holding in *Apprendi* applies only when the disputed 'fact' enlarges the applicable statutory maximum and the defendant's sentence exceeds the original maximum," *United States* v. *Caba*, 241 F.3d 98, 101 (1st Cir. 2001), and that "the relevant 'maximum' under *Apprendi* is found on the face of the statute rather than in the Sentencing Guidelines," *United States* v. *Kinter*, 235 F.3d 192, 201 (4th Cir. 2000), cert. denied, 532 U.S. 937 (2001). Because the Guidelines cap the defendant's sentence at the maximum provided by statute for the offenses of conviction, see Guidelines § 5G1.1(a), a Guidelines sentence can never exceed the statutory maximum.

3. The present controversy

a. In *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), this Court relied on the principle announced in *Apprendi*, and applied in *Ring*, to hold that a sentence imposed under the Washington Sentencing Reform Act of 1981, Wash. Rev. Code § 9.94A *et seq.* (2000), violated the Sixth Amendment, because the court had found facts that permitted it to exceed the standard maximum term permitted by the state statutory guidelines system for the offense of conviction. The Court rejected the State's contention that the "statutory maximum" was not the standard guidelines term but the ten-year maximum for the offense set forth elsewhere in the State's statutes, explaining that "the relevant 'statutory

maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Blakely*, 124 S. Ct. at 2537. The Court "express[ed] no opinion" on whether its decision applied to the Federal Sentencing Guidelines. *Id.* at 2538 n.9.

b. Respondent in *United States* v. *Booker*, No. 04-104, was found guilty after a jury trial of possession of at least 50 grams of cocaine base with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(iii), and distribution of cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Under 21 U.S.C. 841(b)(1)(A)(iii), the maximum sentence for the possession offense was life imprisonment. Booker was sentenced before *Blakely* was decided. In calculating respondent's base offense level under the Guidelines, the district court held him responsible for 658.5 grams of cocaine base. It then increased the offense level based on a finding that respondent had perjured himself at trial. The resulting offense level was 38, which, when combined with a criminal history category of VI (respondent had 23 prior convictions), yielded a Guidelines range of 360 months to life imprisonment. The court imposed a prison term of 360 months. 04-104 Pet. App. 1a-2a; Gov't C.A. Br. 7-12; Sent. Tr. 7-11; PSR ¶¶ 27-49.

Shortly after *Blakely* was handed down, a divided court of appeals reversed and remanded for resentencing. 04-104 Pet. App. 1a-27a. The majority held that *Blakely* precludes a sentencing judge from increasing a defendant's offense level under the Guidelines on the basis of a fact that was not found by the jury or admitted by the defendant. *Id.* at 2a-11a. The majority expressed no view on whether, as applied to Booker, the Guidelines were invalid in their entirety or only insofar as they permit the sentencing judge to find facts that increase the offense level. *Id.* at 11a-13a. Judge Easterbrook dissented. He argued, *inter alia*, that *Blakely* does not apply to the Guidelines because they are not

statutes, and that delegating to a commission the authority to decide which facts justify an increased sentence within the statutory range is permissible for the same reason that such a delegation to judges is permissible. *Id.* at 18a-23a. He also argued that the Federal Guidelines differ from the Washington statutes because the Guidelines require "dozens of findings" that may either raise or lower the sentence, such that no finding can be said to give the defendant a "legal entitlement" to a particular sentence. *Id.* at 23a-24a.

c. Respondent in *United States* v. *Fanfan*, No. 04-105, was found guilty after a jury trial of conspiracy to possess with the intent to distribute and to distribute at least 500 grams of cocaine, in violation of 21 U.S.C. 846, 841(a)(1), and 841(b)(1)(B)(ii). Under 21 U.S.C. 841(b)(1)(B)(ii), the maximum sentence for those offenses was 40 years of imprisonment. Fanfan's sentencing occurred four days after *Blakely* was decided. In calculating his base offense level under the Guidelines, the district court held him responsible for 2.5 kilograms of cocaine and 281.6 grams of cocaine base. The court then increased the offense level based on its finding that respondent was an organizer, leader, manager, or supervisor in the criminal activity. The resulting offense level was 36, which, when combined with a criminal history category of I, yielded a Guidelines range of 188 to 235 months of imprisonment. PSR ¶¶ 1, 19, 24, 27; 04-105 Pet. App. 2a.

The court concluded that *Blakely* applies to the Federal Guidelines, and that respondent therefore could not be sentenced within the applicable range, because the drug quantity and respondent's role in the offense had not been found by the jury. The court instead determined that the appropriate offense level was 26, the level applicable to offenses involving 500 grams of cocaine (the amount found by the jury), which yielded a Guidelines range of 63 to 78 months. The court sentenced respondent to 78 months of imprisonment. 04-105 Pet. App. 4a-13a, 15a.

The government filed a motion to correct sentence, in which it argued that the court had committed clear error by severing the provisions of the Guidelines that it believed violated *Blakely* and applying the remaining provisions. The district court denied the motion. 04-105 Pet. App. 22a-25a.

SUMMARY OF ARGUMENT

I. *Blakely* does not apply to the Federal Sentencing Guidelines. *Blakely*, like its predecessors *Apprendi* and *Ring*, announced a rule barring a judge (absent the defendant's consent) from finding facts that raise a sentence above the otherwise-applicable *statutory* maximum sentence. The Guidelines do not create statutory maximums. Rather, they are the product of the Sentencing Commission, a body in the judicial branch. The Commission is not a legislature and does not perform legislative functions. The functions that it does perform are those that have historically been carried out by sentencing judges: defining the aggravating and mitigating facts that should be taken into account in setting a sentence within the statutory range. The Guidelines are not equivalent to graduated statutory offenses with different "degrees" of seriousness.

In a series of cases, this Court has consistently recognized the distinction between facts that increase a defendant's offense level under the Guidelines and facts that increase a statutory maximum, and it has consistently sustained a judge's power to find facts that raise the Guidelines sentence. Those cases confirm that the Guidelines do not establish statutory maximum terms, and their results cannot be reconciled with a holding that *Blakely* applies to judicial factfinding under the Guidelines.

If *Blakely* is read, however, to establish a broader rule that extends the Sixth Amendment jury-trial right to facts that increase the boundaries of a judge's sentencing discretion under the Guidelines, that aspect of *Blakely* should be reconsidered and rejected. Reading *Blakely* that broadly

would require the overruling of many recent decisions and would produce a rule for which there is no specific historical basis. It would also thwart Congress's considered judgment about the necessity of establishing a sentencing commission in the judicial branch to structure judicial sentencing discretion and to eliminate invidious and unwarranted disparities in sentencing.

II. If *Blakely* is held to apply to the Guidelines, the proper judicial response is to hold that the Guidelines as a whole are inapplicable in cases in which the Constitution would override the Guidelines' requirement that the district court find a sentence-enhancing fact. Courts would then exercise sentencing discretion within the congressional minimum and maximum terms, with the Guidelines providing advisory guidance. The alternative—administering the Guidelines through a series of jury verdicts on sentence-enhancing facts—would produce a system radically different from the one designed by Congress and the Sentencing Commission. Grafting jury-trial procedures onto the Guidelines would create a hybrid system that would not function in the manner intended by its creators (and in some cases could not function at all); would require extensive judicial lawmaking to implement; and would undermine a key premise of *Mistretta* and raise serious constitutional questions about whether the Sentencing Commission can effectively define offense elements that govern the primary conduct of citizens. Rather than attempting to reconceptualize the Guidelines as elements of federal crimes and to inject jury factfinding into a system clearly intended to channel *judicial* sentencing discretion, it should be left to Congress (and the Commission) to reconstruct a sentencing system that constitutionally achieves the congressional goals.

ARGUMENT

I. *BLAKELY* DOES NOT APPLY TO THE UNITED STATES SENTENCING GUIDELINES

Under the Fifth and Sixth Amendments, a defendant has a right to have a fact found by a jury, based on proof beyond a reasonable doubt, when the fact increases the statutory maximum sentence set by the legislature. Such a fact is the functional equivalent of an element of a greater offense than the one carrying the otherwise-applicable statutory maximum. *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000); see *Ring* v. *Arizona*, 536 U.S. 584 (2002); *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004). That constitutional rule ensures that the legislature takes responsibility for deciding what penalties are, "in the legislature's judgment, generally proportional to the crime," and it thereby provides "structural democratic constraints" against "potentially harsh legislative action." *Apprendi*, 530 U.S. at 490-491 n.16 (internal quotation marks omitted). The question in these cases is whether the requirements of *Apprendi* apply to a fact that raises a defendant's offense level under the United States Sentencing Guidelines. The answer is no, because, unlike the statutes at issue in *Apprendi*, *Ring*, and *Blakely*, the Guidelines do not set statutory maximum sentences. If, however, the Court concludes that *Blakely* established a broader principle that the jury must now find any fact that raises the upper bound on a judge's sentencing discretion, including findings under the Guidelines, then that aspect of *Blakely* should be reconsidered and rejected.

A. The Requirements Of *Apprendi* Apply To A Fact That Increases The Statutory Maximum Sentence

1. In *Apprendi*, the defendant pleaded guilty to second-degree possession of a firearm. The New Jersey statute that defined that offense set a statutory maximum prison term of ten years, but under a different statute the maximum

sentence was 20 years if the defendant acted with a biased purpose. The trial court found, by a preponderance of the evidence, that the defendant had acted with a biased purpose and imposed a prison term of 12 years. This Court held that the fact of biased purpose was subject to the Constitution's jury-trial and proof-beyond-a-reasonable-doubt guarantees, and that the 12-year sentence was therefore unconstitutional.

The basis for the Court's decision in *Apprendi* was not that the judge's finding of biased purpose increased the defendant's sentence, but that it increased the sentence beyond the otherwise-applicable statutory maximum, such that it was the functional equivalent of a different, aggravated offense. That the decision rested on the narrower ground is clear from the Court's statement of its holding: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490 (emphasis added). The basis for the decision is also clear from the Court's reasoning. The Due Process Clause of the Fourteenth Amendment and jury-trial provision of the Sixth Amendment precluded the imposition of a sentence of more than ten years, the Court said, because those protections "entitle a criminal defendant to 'a jury determination that [he] is guilty of *every element* of the crime with which he is charged, beyond a reasonable doubt.'" 530 U.S. at 477 (quoting *United States* v. *Gaudin*, 515 U.S. 506, 510 (1995)) (emphasis added). When a fact results in "an increase beyond the maximum authorized statutory sentence," the Court explained, "it is *the functional equivalent of an element* of a greater offense than the one covered by the jury's guilty verdict." *Id.* at 494 n.19 (emphasis added). Indeed, under those circumstances, the fact "fits squarely within the usual definition of an 'element' of the offense." *Ibid.* In *Apprendi*, therefore, the effect of a finding that the defendant acted with a biased purpose was

"to turn a second-degree offense into a first-degree offense." *Id.* at 494.[7]

The Court explicitly recognized that the jury-trial and proof-beyond-a-reasonable-doubt guarantees do *not* apply to facts that a judge relies on to increase a sentence to a level below the statutory maximum. The Court emphasized that it was not "impermissible for judges to exercise discretion —taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute," since, as the Court has "often noted," judges "have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case." *Apprendi*, 530 U.S. at 481 (citing *Williams* v. *New York*, 337 U.S. 241, 246-247 (1949)).

2. In *Ring*, a jury found the defendant guilty of first-degree murder. That verdict made him eligible for the death penalty under Arizona law, but only if the trial court found at least one of the ten aggravating circumstances enumerated in the statute. The trial court found two such circumstances and sentenced the defendant to death. This Court held the Arizona death-penalty statute unconstitutional under *Apprendi*, because it permitted the trial court rather than the jury to make the finding that increased the statutory maximum sentence from life imprisonment to death. Noting that "Apprendi's sentence violated his right to 'a jury determination that [he] is guilty of every element of the crime with which he is charged,'" 536 U.S. at 602 (quoting *Apprendi*, 530 U.S. at 477), the Court in *Ring* held that "Arizona's enumerated aggravating factors," like the "hate crime" enhancement in *Apprendi*, "operate as 'the functional

[7] *Apprendi* also noted that the ability of a judge to sentence in excess of the statutory maximum deprived defendants of notice by precluding their ability "to discern from the statute of indictment what maximum punishment conviction under that statute could bring." 530 U.S. at 483 n.10. Accord *id.* at 485 n.12.

equivalent of an element of a greater offense,'" *id.* at 609 (quoting *Apprendi*, 530 U.S. at 494 n.19).

3. In *Blakely*, the defendant pleaded guilty to second-degree kidnapping involving a firearm. Under Washington's Sentencing Reform Act, second-degree kidnapping, when committed by someone with the defendant's "offender score," carries a sentencing range of 13 to 17 months of imprisonment, and, by virtue of a 36-month enhancement for possession of a firearm, second-degree kidnapping involving a firearm carries a sentencing range of 49 to 53 months. 124 S. Ct. at 2535. A sentencing judge could nevertheless impose a sentence of up to ten years, the maximum set by a different statute, if he determined that there was a reason for an "exceptional sentence." *Ibid.* The trial court found that the defendant had acted with "deliberate cruelty," a statutory basis for an exceptional sentence, and imposed a prison term of 90 months on the basis of that finding. *Id.* at 2535-2536. This Court held that the sentence violated the Sixth Amendment.

The Court began its analysis by stating that the case required it to apply the rule of *Apprendi*, and then quoted the familiar holding of that case: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Blakely*, 124 S. Ct. at 2536 (quoting *Apprendi*, 530 U.S. at 490). After describing how that principle was applied in *Apprendi* and *Ring*, the Court found the principle to be applicable in *Blakely* as well, because the sentence exceeded "the 53-month statutory maximum" based on a finding of "deliberate cruelty" and the facts supporting that finding "were neither admitted by [the defendant] nor found by a jury." *Id.* at 2537. Rejecting the State's contention that the "statutory maximum" was ten years, the Court explained that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of

the facts reflected in the jury verdict or admitted by the defendant." *Ibid.* (emphasis omitted). In other words, the Court said, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." *Ibid.* (emphasis omitted). The Court concluded that "[t]he 'maximum sentence' is no more 10 years here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime) or death in *Ring* (because that is what the judge could have imposed upon finding an aggravator)." *Id.* at 2538.

Blakely thus applied the rule of *Apprendi*: that a fact must be submitted to the jury if it increases the penalty beyond the "statutory maximum." 124 S. Ct. at 2536 (quoting *Apprendi*, 530 U.S. at 490). *Blakely* found that the relevant "statutory maximum" was not ten years but 53 months because, as in *Apprendi* and *Ring*, "one must start with the lowest statutory maximum and ask the jury to make findings that raise the sentence to which the defendant is exposed." 04-104 Pet. App. 19a (Easterbrook, dissenting). As the Fifth Circuit has explained, "[t]he sentencing scheme at issue in *Blakely*, like that involved in *Apprendi*, essentially established two distinct statutory maximum sentences"; in such a circumstance, "it makes sense to say that the legislature has effectively created distinct offenses." *United States* v. *Pineiro*, 377 F.3d 464, 473 (2004), petition for cert. pending, No. 04-5263 (filed July 14, 2004). Thus, just as a finding of biased purpose in *Apprendi* had the effect of "turn[ing] a second-degree offense into a first-degree offense," *Apprendi*, 530 U.S. at 494, and just as the offense of first-degree murder in *Ring* "is properly understood to be a lesser included offense of 'first-degree murder plus aggravating circumstance(s),'" *Sattazahn* v. *Pennsylvania*, 537 U.S. 101, 112 (2003) (opinion of Scalia, J.), *Blakely* effectively treated the Washington legislature as "having established three degrees of [the] kidnapping" offense of which the defendant

was convicted, with "the distinction between [the highest and the intermediate] * * * degree [being] deliberate cruelty," 04-104 Pet. App. 22a (Easterbrook, J., dissenting).

There is language in *Blakely* that could be read to suggest a broader rule. See 124 S. Ct. at 2537 ("the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts [beyond the jury's verdict], but the maximum he may impose *without* any additional findings"). On such a reading, the case would establish a rule that the type of sentencing fact that must be submitted to a jury is not merely one that increases the otherwise-applicable *statutory* maximum (as *Apprendi* held), but "any fact that increases the upper bound on a judge's sentencing discretion." *Id.* at 2546 (O'Connor, J., dissenting). That is how the opinion was interpreted by the court of appeals majority in *Booker*. See 04-104 Pet. App. 10a ("*Blakely* redefined 'statutory maximum'"). But the Court in *Blakely* explicitly stated that it was "apply[ing] the rule" of *Apprendi*, 124 S. Ct. at 2536, and that rule governs facts that increase the penalty "beyond the prescribed statutory maximum." *Ibid.* *Blakely* (like *Apprendi*) involved a fact that increased what the Court itself accurately described as a "statutory maximum," *id.* at 2537, *i.e.*, a maximum set by statute. Because *Blakely*, like *Apprendi*, involved multiple statutory maximum sentences and so necessarily required a search for "the relevant 'statutory maximum,'" *ibid.*, any language in *Blakely* that suggests a broader rule was not necessary to the outcome. As Judge Easterbrook observed, in responding to the claim that "it does not matter" under *Blakely* "whether the maximum is statutory," *Blakely* "does not hold that," and indeed "*could not* 'hold' that," given that "it dealt with statutes exclusively." 04-104 Pet. App. 20a (dissenting opinion).

B. A Fact That Increases A Defendant's Offense Level Under The Sentencing Guidelines Does Not Increase The Statutory Maximum Sentence

Apprendi applied in *Blakely* because the Washington Sentencing Reform Act was found to establish "statutory maximum" sentences. *Apprendi* does not apply here, because the Federal Sentencing Guidelines do not establish statutory maximum sentences.

1. The functions performed by the Sentencing Commission are those that have historically been performed by sentencing judges

a. The most basic reason that the Sentencing Commission does not set statutory maximum sentences is that Congress itself establishes such maximum terms, and the Commission is not a legislature but "an independent commission in the judicial branch," 28 U.S.C. 991(a), which formulates the Guidelines in order to channel judicial discretion in sentencing. *Mistretta*, 488 U.S. at 395. Indeed, one of the central reasons that this Court rejected a separation-of-powers challenge to the Guidelines in *Mistretta* is that the Commission does "not bind or regulate the primary conduct of the public," *id.* at 396, is not engaged in "the legislative business of determining what conduct should be criminalized," *id.* at 407, and does not exercise "the legislative responsibility for establishing minimum and maximum penalties for every crime," *id.* at 396. Rather than being legislative, *Mistretta* explained, "the Commission's functions * * * are clearly attendant to a central element of the historically acknowledged mission of the Judicial Branch." *Id.* at 391. In particular, the questions assigned to the Commission are "precisely the questions" that were decided by "the Judicial Branch, as an aggregate," before the enactment of the Sentencing Reform Act of 1984: "what sentence" within the statutory range "is appropriate to what criminal conduct under what circumstances." *Id.* at 395. The "every-

day business of judges, taken collectively," was "to evaluate and weigh the various aims of sentencing and to apply those aims to * * * individual cases." *Ibid.* *Mistretta* held that the Commission "does no more than this, albeit basically through the methodology of sentencing guidelines, rather than entirely individualized sentencing determinations." *Ibid.*[8]

Mistretta thus confirms that the Sentencing Commission, which considers and then regularizes the same factors that courts had always considered in imposing sentence, exercises functions that have historically been carried out by sentencing judges, not by Congress. No one would suggest that facts found by a sentencing judge before the advent of the Guidelines were subject to the requirements of the Sixth Amendment. *Apprendi* explicitly stated that its holding does not prevent judges from "taking into consideration various factors relating both to offense and offender" in "imposing a [sentence] within the range prescribed by statute," 530 U.S. at 481 (emphasis omitted), and it explicitly distinguished a "factor" of this type from a fact that results in "an increase beyond the maximum authorized statutory sentence," such that the fact is "the functional equivalent of an element of a greater offense," *id.* at 494 n.19. *Blakely*, too, acknowledged that *Apprendi* does not prohibit "judicial fact-finding" when the judge is "rul[ing] on those facts he deems important to the exercise of his sentencing discretion." 124

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[8] This view is consistent with the fact that, in formulating the Guidelines, the Commission canvassed prior sentencing practices and attempted to identify all the factors that judges traditionally used in determining an appropriate sentence. See United States Sentencing Comm'n, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 16-17 (1987). See also 28 U.S.C. 994(m) (requiring Commission to "ascertain the average sentences * * * prior to the creation of the Commission"). In formulating such pre-Guidelines sentences, judges had considered a "wide variety of factors in addition to evidence bearing on guilt." *Nichols* v. *United States*, 511 U.S. 738, 747 (1994).

S. Ct. at 2540. Since the Sentencing Commission does "no more" than what sentencing judges did under the old regime, *Mistretta*, 488 U.S. at 395, "the Commission's act of establishing sentencing ranges in the Guidelines is categorically different from the legislative act of setting a maximum penalty in a substantive criminal statute," *United States* v. *Kinter*, 235 F.3d 192, 201 (4th Cir. 2000), cert. denied, 532 U.S. 937 (2001). And since "*Blakely* itself * * * tells us that legislatures *may* delegate such issues to the judiciary * * * without offending the [S]ixth [A]mendment," 04-104 Pet. App. 21a (Easterbrook, J., dissenting), *Blakely* should not prevent Congress from delegating the issues to a commission that has taken on an "historically acknowledged mission of the Judicial Branch," *Mistretta*, 488 U.S. at 391.

A conclusion that the Sixth Amendment does not apply to a delegation of authority to sentencing *judges*, but does apply to a delegation to a sentencing *commission*, would be particularly anomalous in light of the underlying purpose for authorizing a commission in the judicial branch to promulgate sentencing guidelines. The delegation of discretion to individual judges to find facts relevant to sentencing resulted in widely disparate and potentially arbitrary sentences for similarly situated defendants. The delegation to the Sentencing Commission grants no additional factfinding power to sentencing judges, as opposed to juries, but seeks only to channel judicial discretion in order to eliminate unwarranted disparities. As Judge (then Professor) Lynch has observed,

> [i]f it was acceptable for a judge * * * to decide that the defendant before him was a Mafia member who committed the assault on orders of a crime boss, rather than, as he contended, just an acquaintance of the victim who acted out of anger, and to allow that fact to influence the degree of punishment or 'correction' required for the defendant, it is difficult * * * to see why the fact must be proved beyond a reasonable doubt to a jury once an institutional mechanism is in place to insist that the few judges who would not have regarded this fact as relevant on their own take it into account nevertheless.

Gerard E. Lynch, *Towards A Model Penal Code, Second (Federal?): The Challenge of the Special Part*, 2 Buff. Crim. L. Rev. 297, 321 (1998). Accord *United States* v. *Koch*, No. 02-6278, 2004 WL 1899930, at *5 (6th Cir. Aug. 26, 2004) (en banc) ("If federal judges * * * may consider facts that increase sentences in an indeterminate sentencing regime, is it not permissible for this branch of government collectively to channel the consequences of these facts based on their group experience?").

In *Blakely*, the Court said that the Sixth Amendment does not apply to facts that a judge "deems important to the exercise of his sentencing discretion" under a system of discretionary sentencing because such facts "do not pertain to whether the defendant has a legal *right* to a lesser sentence." 124 S. Ct. at 2540. But the Commission's systematizing of the general manner in which courts exercise their sentencing discretion should not produce a radical change in the way in which the facts bearing on the exercise of sentencing discretion must be found. Even under a system of discretionary sentencing, a legislature could have required all judges in a district to participate in "sentencing councils" in an effort to regularize their practices.[9] The legislature could have further authorized appellate review to ensure that judges exercised discretion in light of the work of the councils, and that unjustified departures from a council's

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[9] In fact, before the Guidelines, Congress authorized judicial institutes and councils "to formulate standards and criteria for sentencing." *Mistretta*, 488 U.S. at 365 (citing 28 U.S.C. 334). The councils, which could not establish enforceable norms, were not viewed as a sufficient means to relieve sentencing disparities. See Symposium, *Appellate Review of Sentences*, 32 F.R.D. 249, 270 (1962).

suggested sentences, within the wide ranges afforded by statute, constituted an abuse of discretion. Over time, through a common-law process, reviewing courts could have developed a body of precedent that gave rise to legal norms on how long a sentence should be for particular conduct. Cf. 04-104 Pet. App. 21a (Easterbrook, J., dissenting) (noting that a district court could have set forth in written opinions, "as a matter of common law," the factors on which it would rely in imposing sentence within the statutory range in different types of cases, *e.g.*, "10 years unless the burglar uses a gun; if a gun, then 40 years"). Such a system could be understood as conferring a "legal right" on a defendant to be sentenced in accordance with the appellate "guidelines." But it could not be maintained that the judiciary's own creation of systematic standards for considering sentencing factors constituted the creation of new elements of offenses. There is no greater reason to apply the Sixth Amendment to the present system, under which accumulated judicial wisdom about the facts that matter at sentencing is collectively reflected in rules promulgated by a commission in the judicial branch.

b. There are respects in which Congress's delegation of authority to the Sentencing Commission differs from its delegation to sentencing judges in the pre-Guidelines era. For one thing, Guidelines promulgated by the Commission must be submitted to Congress and do not take effect for a period of 180 days, during which time Congress may "modif[y] or disapprove[]" the proposed guidelines. 28 U.S.C. 994(p). Even after Guidelines have taken effect, Congress can "revoke or amend" them "at any time." *Mistretta*, 488 U.S. at 393-394. And Congress has in fact exercised that authority. It has rejected proposed guidelines;[10] it has directed the Commission to review and, if appropriate,

[10] See Act of Oct. 30, 1995, Pub. L. No. 104-38, § 1, 109 Stat. 334.

amend Guidelines;[11] and it has even enacted Guidelines amendments itself.[12]

The delegation to the Sentencing Commission also differs from a delegation to judges in that the Sentencing Reform Act provides that, except in the unusual case in which a departure is justified, a district court "shall impose a sentence of the kind, and within the range," set by the Guidelines. 18 U.S.C. 3553(b). As this Court has observed, Congress has thereby made the Guidelines "binding on federal courts." *Stinson* v. *United States*, 508 U.S. 36, 42 (1993).

Finally, the courts of appeals have widely held that the *Ex Post Facto* Clause applies to changes in the Guidelines. See *United States* v. *Bell*, 991 F.2d 1445, 1447 & n.4 (8th Cir. 1993). Since this Court has made clear that "the *Ex Post Facto* Clause does not apply to judicial decisionmaking," *Rogers* v. *Tennessee*, 532 U.S. 451, 462 (2001) (emphasis added), that Clause would have no force in regulating whether a judge in the pre-Guidelines system could impose a higher sentence on the basis of a fact that he would not have relied upon at the time of the offense. The application of the *Ex Post Facto* Clause to the Guidelines thus suggests that they are "legislative" for that purpose. Cf. *Miller* v. *Florida*, 482 U.S. 423 (1987) (applying *Ex Post Facto* Clause to revised state statutory guidelines).

The differences between Congress's delegation of authority to the Sentencing Commission and its earlier delegation to district courts, however, do not make the Commission more like an agent of the legislature than like a vehicle for distilling the collective practices of sentencing judges as a whole and rationalizing and harmonizing those practices in

[11] See 28 U.S.C. 994 note (Provisions for Review, Promulgation, or Amendment of Federal Sentencing Guidelines).

[12] See PROTECT Act, Pub. L. No. 108-21, § 401(b), (g), and (i), 117 Stat. 668-669, 671-673 (2003).

light of the defined purposes of sentencing. Congress is accountable for the definition of crimes and the maximum penalties for the prohibited conduct, such that the legislature remains responsive to "structural democratic constraints" in fixing the maximum punishment that is proportionate to a crime. *Apprendi*, 530 U.S. at 490-491 n.16. Congress continues to exercise that responsibility by increasing maximum sentences for crimes it deems particularly serious. The jury-trial guarantee is not offended by permitting an independent commission in the Judicial Branch to examine the characteristics that differentiate offenders and to make refinements in where defendants fall on the spectrum of offenders who violate a particular statute. The jury-trial guarantee does not mandate that *all* facts that increase a sentence within a statutory range must be treated as elements. See *Williams* v. *New York*, 337 U.S. 241 (1949). Rather, the guarantee applies only to those facts that increase a sentence above what the *legislature* has found to be warranted by the elements specified in the statute.

2. The Sentencing Guidelines bear no resemblance to a graduated statutory offense with different "degrees" of seriousness

The principle of *Apprendi* is that the Constitution's jury-trial and proof-beyond-a-reasonable-doubt guarantees apply to any fact that is "the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." 530 U.S. at 494 n.19. That principle could be said to apply in *Blakely* on the premise that the Washington statutes effectively created statutory offenses whose "degree" depends on the presence or absence of a particular aggravating fact. The Washington scheme imposed multiple statutory maximum sentences and required the courts to identify the "relevant" statutory maximum. The United States Sentencing Guidelines, however, cannot be understood as creating grades of statutory offenses.

a. Under the Washington Sentencing Reform Act considered in *Blakely*, for every crime, there was a particular sentencing range for the simplest form of an offense of conviction combined with the defendant's criminal history (the "standard range"); additional prison time could be added to the standard range based on the presence of one or more of a limited number of designated aggravating facts (such as use of a firearm); and the standard range could be increased further based on the presence of one or more other aggravating facts, which need not be those listed in the statute (an "exceptional sentence"). See Wash. Rev. Code §§ 9.94A.125, .310, .350, .360, .370, and .390 (2000). For each offense in Washington's Criminal Code, Wash. Rev. Code tit. 9A (2000), therefore, the Washington Sentencing Reform Act set the penalties for the basic offense and aggravated forms of the offense. In *Blakely*, for example, the three forms of the offense were second-degree kidnapping (punishable by 13 to 17 months of imprisonment), second-degree kidnapping involving a firearm (punishable by 49 to 53 months), and second-degree kidnapping involving a firearm and deliberate cruelty (punishable by up to ten years).

The Washington scheme thus resembles federal statutes that set three different maximum penalties for an offense depending on the presence or absence of certain aggravating facts. For example, under 18 U.S.C. 111 (as amended by the Federal Judiciary Protection Act of 2002, Pub. L. No. 107-273, § 11008(b), 116 Stat. 1818), "simple assault" is punishable by a maximum of one year in prison and "all other" assaults are punishable by a maximum of eight years, unless the defendant "use[d] a deadly or dangerous weapon" or "inflict[ed] bodily injury," in which case the maximum sentence is 20 years. And under 21 U.S.C. 841(b)(1), a cocaine offense committed by a defendant with no prior felony drug convictions is punishable by a maximum of 20 years of imprisonment if it involved an unspecified quantity of drugs; a maximum of 40 years if it involved a threshold quantity of

drugs (at least 500 grams of cocaine); and a maximum of life if it involved a higher threshold quantity (at least five kilograms of cocaine). *Apprendi* indisputably applies to 18 U.S.C. 111,[13] to 21 U.S.C. 841(b)(1),[14] and to other federal statutes with three different maximum penalties.[15] Those statutes necessarily require the identification of the "relevant" statutory maximum. Certain facts move a defendant from one statutory offense to another, and those facts must be considered, for *Apprendi* purposes, as elements that alter the statutory maximum sentence. Similar logic can explain the Court's application of *Apprendi* to Washington's Sentencing Reform Act in *Blakely*. See 04-104 Pet. App. 18a (Easterbrook, J., dissenting) (*Blakely* is this Court's "analog" to Seventh Circuit case applying *Apprendi* to 21 U.S.C. 841(b)(1)).

b. Unlike the New Jersey statutes at issue in *Apprendi*, the Arizona statutes at issue in *Ring*, and the Washington statutes at issue in *Blakely*, the Guidelines do not "divide crimes into narrow degrees and standard categories," but instead "provide a methodology for assessing the seriousness of different instances of crime, quite separate from the elements of any particular statutory crime." *United States* v. *Emmenegger*, No. 04 CR. 334 (GEL), 2004 WL 1752599, at *16 (S.D.N.Y. Aug. 4, 2004) (Lynch, J.). There are fundamental differences between that methodology and the manner in which the Washington statutes operate.

[13] See *United States* v. *Campbell*, 259 F.3d 293, 298-299 (4th Cir. 2001); *United States* v. *McCulligan*, 256 F.3d 97, 99-100 (3d Cir. 2001).

[14] See *United States* v. *Longoria*, 298 F.3d 367, 368 (5th Cir.) (en banc) (per curiam) (courts of appeals "have unanimously agreed that drug quantities triggering increased penalties under 21 U.S.C. § 841 are facts that must be submitted to a jury and charged in an indictment under the *Apprendi* rule"), cert. denied, 537 U.S. 1038 (2002).

[15] See, *e.g.*, *United States* v. *Williams*, 343 F.3d 423, 432-434 (5th Cir.) (18 U.S.C. 242 (deprivation of rights under color of law)), cert. denied, 124 S. Ct. 966 (2003); *United States* v. *Friedman*, 300 F.3d 111, 127 (2d Cir. 2002) (18 U.S.C. 1952 (interstate travel in aid of racketeering)), cert. denied, 538 U.S. 981 (2003).

First, the Washington statutes can be seen as defining offenses of three grades: one that carries the standard sentence; one that carries the standard sentence increased by additional time; and one that carries an exceptional sentence. Under the Guidelines, by contrast, multiple factors, defined by the Commission, influence the sentence imposed under a single statutory maximum. Congress has not created alternative possible statutory maximum sentences, and there is thus no need to identify the "relevant" one.

Unlike a traditional statute defining simple and aggravated forms of an offense, the Sentencing Guidelines seek to "reflect every important factor relevant to sentencing for each category of offense and each category of offender." Senate Report 169. Under the principal drug Guideline, for example, there are 19 possible base offense levels, five specific offense characteristics that can increase the offense level, and two cross-references requiring the application of a different Guideline. Guidelines § 2D1.1. And under the principal theft and fraud Guideline, there are 14 separate specific offense characteristics that can increase the defendant's offense level. *Id.* § 2B1.1(b). There are also a dozen upward adjustments that could apply in any case—one of two possible adjustments for victim vulnerability, *id.* § 3A1.1(b); four others relating to the victim, *id.* §§ 3A1.1(a), 3A1.2, 3A1.3; one relating to terrorism, *id.* § 3A1.4; one of three possible adjustments for the defendant's role in the offense, *id.* § 3B1.1; one for abuse of trust or use of a special skill, *id.* § 3B1.3; one for use of a minor, *id.* § 3B1.4; one of two possible adjustments for use of body armor, *id.* § 3B1.5; one for obstruction of justice, *id.* § 3C1.1; and one for reckless endangerment during flight, *id.* § 3C1.2.

In determining whether each of these facts is present in a particular case, the sentencing judge is required to consider not merely the offense of conviction but all "relevant

conduct." Guidelines § 1B1.3(a). That concept includes "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant" that occurred "during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." *Id.* § 1B1.3(a)(1)(A). In cases involving jointly undertaken criminal activity, it also includes "all reasonably foreseeable acts and omissions of others" in furtherance of such activity that occurred in connection with the offense of conviction. *Id.* § 1B1.3(a)(1)(B). And in cases where the offense level is determined largely on the basis of some measure of aggregate harm (including fraud and drug cases), it also includes all acts and omissions that were "part of the same course of conduct or common scheme or plan as the offense of conviction." *Id.* § 1B1.3(a)(2).

The myriad of relevant factors and possible sentences reflects the Guidelines' purpose of channeling discretion, rather than creating elements of distinct crimes. In view of the "complex interactions" among "the dozens of findings that matter to the Guidelines' operation in each case," 04-104 Pet. App. 23a-24a (Easterbrook, J., dissenting), facts that increase a defendant's offense level cannot reasonably be viewed as the functional equivalent of elements of greater offenses. It would be particularly difficult to conceptualize relevant conduct—conduct that, "very roughly speaking, corresponds to those actions and circumstances that courts typically took into account when sentencing prior to the Guidelines' enactment," *United States* v. *Wright*, 873 F.2d 437, 441 (1st Cir. 1989) (Breyer, J.), quoted in *United States* v. *Watts*, 519 U.S. 148, 152 (1997) (per curiam)—as an element of a greater offense, since relevant conduct, by definition, falls outside the boundaries of the conduct constituting the offense. Thus, while it may make sense, when viewing Washington's Sentencing Reform Act through a Sixth Amendment prism, to regard the Act as defining three "degrees" of every offense in its Criminal Code, it is not reasonable to think that, for each offense in the United States Code, there are "a hundred different * * * 'offenses' corresponding to the myriad possible permutations of Guidelines factors." *Pineiro*, 377 F.3d at 473.

Second, under the Washington statutes, the offense of conviction dictates a particular "seriousness level," which in turn (in combination with the defendant's "offender score") dictates a "standard sentence range" that can be viewed as the maximum penalty for the lowest "degree" of the offense at issue. "No 'standard' sentence * * * emerges from the Guidelines in the same way that it does for the [system] * * * that Washington's legislature adopted." *Koch*, 2004 WL 1899930, at *6. Indeed, the Guidelines "defy any effort to identify a 'standard sentenc[e] range'" for a particular offense, *Emmenegger*, 2004 WL 1752599, at *16, because they do not set a penalty for the offense of conviction. Unlike the "seriousness level" of the offense of conviction under the Washington statutes, a defendant's base offense level under the Guidelines does not correspond to any particular sentence, because a Guidelines range cannot be determined until the judge applies specific offense characteristics and adjustments under Chapter Three (which can either increase or decrease the offense level); "groups" the counts (in a multi-count case) and adjusts the offense level accordingly; reduces the offense level (if appropriate) for acceptance of responsibility; calculates the defendant's criminal history category; and then makes any further adjustments under Chapter Four. See Guidelines § 1B1.1(a)-(g).

Not only is there no corresponding Sentencing Guidelines range for the offense of conviction, there is frequently no corresponding base offense level. While the Guideline that is applicable in a given case depends on the offense of conviction, Guidelines §§ 1B1.1(a), 1B1.2(a), the applicable Guideline will often require the sentencing judge to apply one rather than another of multiple base offense levels, *e.g.*,

id. § 2A5.2(a), or direct the judge to a different Guideline entirely, *e.g.*, *id.*, § 2B1.1(c), if a particular fact, taking into account all relevant conduct, see *id.* § 1B1.3(a)(i) and (iii), is found to be present.

Third, under the Guidelines, when the offense level is increased on the basis of a specific offense characteristic or adjustment, the resulting offense level, like the base offense level, does not correspond to any particular sentencing range. Unlike the Washington statutes, the Guidelines do not establish an increased "standard sentence range" for a higher "degree" of the offense at issue, because, before a Guidelines range can be calculated, there may be *reductions* (as well as increases) in the offense level under Chapter Two, Chapter Three, or both. See, *e.g.*, Guidelines § 2D1.1(b)(6) ("safety valve" in drug case); *id.* § 3B1.2 (minor or minimal role); *id.* § 3E1.1 (acceptance of responsibility). The Guidelines are not a system of isolated enhancements that are individually applied to create higher "degrees" of the offense of conviction, but an integrated system of enhancements and reductions that in combination yield a sentencing range for each defendant. Thus, in contrast to statutory maximum terms, which are approved by Congress, clear on the face of a law, and applicable to all defendants sentenced under that provision, Guidelines maximums are litigated case-by-case for each defendant, vary considerably depending on the facts, and are not specifically approved by Congress.

C. This Court Has Consistently Recognized The Distinction Between A Fact That Increases The Statutory Maximum And A Fact That Increases A Defendant's Offense Level Under The Guidelines

In the seven years before *Apprendi* was decided, this Court decided four cases involving sentence-enhancing facts under the Guidelines. While none presented a claim that the Sixth Amendment precludes sentencing judges from finding such facts, in each case "the Court addressed a question not

dissimilar to the one presented here," *Koch*, 2004 WL 1899930, at *3, and in each case it "affirmed sentences that would appear to present the very concerns that some now argue invalidate the Guidelines," *Emmenegger*, 2004 WL 1752599, at *11. It did so, moreover, unanimously in two of the cases; by summary disposition in a third; and "without a murmur of constitutional qualm" in any. *Ibid.* In rejecting challenges to Guidelines sentences, these decisions also did what the decisions below did not: they "embraced and relied" on "the proposition that the United States Code, *and not the Guidelines*, establishes maximum sentences for offenses," *Pineiro*, 377 F.3d at 471, 473, and they treated facts that mandate a higher sentence under the Guidelines as the analytical equivalent of facts that might have led to a higher sentence as a matter of judicial discretion in the pre-Guidelines era. These decisions have thus "articulated a particular vision of the interaction between the Guidelines and the United States Code," *Pineiro*, 377 F.3d at 473, and that vision is fundamentally at odds with the view that *Apprendi* or *Blakely* applies to the Guidelines.

1. In *United States* v. *Dunnigan*, 507 U.S. 87 (1993), the Court unanimously held that, upon a determination by the sentencing judge that the defendant committed perjury at trial, "an enhancement of sentence is required" by Section 3C1.1 of the Guidelines. *Id.* at 98. Rejecting the contention that such a requirement is "in contravention of the privilege of an accused to testify in her own behalf," *ibid.*, the Court found the case indistinguishable from *United States* v. *Grayson*, 438 U.S. 41 (1978), a pre-Guidelines case that "upheld a sentence increase based on an accused's false testimony at trial," *Dunnigan*, 507 U.S. at 91. In following *Grayson*, the Court found it irrelevant that the Guidelines enhancement, unlike the one at issue in that case, "stems from a congressional mandate rather than from a court's discretionary judgment." *Id.* at 98. The Court also rejected the notion that "the enhancement is * * * a mere surrogate for a

perjury prosecution," noting that "[t]he perjuring defendant's willingness to frustrate judicial proceedings to avoid criminal liability suggests the need for incapacitation and retribution is heightened as compared with the defendant charged with the same crime who allows judicial proceedings to progress without resorting to perjury." *Id.* at 97-98.

2. In *Witte* v. *United States*, 515 U.S. 389 (1995), the defendant had engaged in two related drug transactions but was initially prosecuted only for the second. After a guilty plea, the sentencing judge treated both transactions as relevant conduct in calculating the drug quantity for which the defendant was responsible under Section 2D1.1 of the Guidelines, with the result that his offense level was higher than it would have been if the first transaction had been excluded. When the defendant was subsequently prosecuted for the first transaction, the district court dismissed the indictment on double-jeopardy grounds.

This Court held that the dismissal was improper. It found the case to be governed by *Williams* v. *Oklahoma*, 358 U.S. 576 (1959), a pre-Guidelines case holding that "use of evidence of related criminal conduct to enhance a defendant's sentence for a separate crime within the authorized statutory limits does not constitute punishment for that conduct within the meaning of the Double Jeopardy Clause." 515 U.S. at 399. Applying that principle, the Court found no double-jeopardy violation, because, while including the drugs from both transactions had increased the Sentencing Guidelines range, the range "still [fell] within the scope of the legislatively authorized penalty," which was 5 to 40 years. *Ibid.* In relying on *Williams*, the Court rejected the suggestion that "the Sentencing Guidelines somehow change the constitutional analysis." *Id.* at 401. Noting that "[t]he relevant conduct provisions are designed to channel the sentencing discretion of the district courts and to make mandatory the consideration of factors that previously would have been optional," the Court concluded that a defendant "has

not been 'punished' any more for double jeopardy purposes when relevant conduct is included in the calculation of his offense level than when a pre-Guidelines court, in its discretion, took similar uncharged conduct into account." *Id.* at 401-402.

A holding that *Apprendi* applies to the Guidelines could not be reconciled with *Witte*. If the Guidelines offense level for a defendant found guilty of drug transaction A can be increased on the basis of drug transaction B only if drug transaction B is charged in the indictment and found by the jury based on proof beyond a reasonable doubt, it would appear that, contrary to *Witte*'s holding, the government could not charge drug transaction B as a stand-alone crime in a subsequent case. That is because drug transaction B would be the functional equivalent of a lesser included offense of the "greater offense" of "drug transaction A plus drug transaction B," and the Double Jeopardy Clause prohibits a prosecution for a lesser included offense following a prosecution for the greater offense. See *Brown* v. *Ohio*, 432 U.S. 161, 168-169 (1977). Nor is it clear that *Witte* could be distinguished on the ground that, while drug transaction B might be an element of a greater offense for purposes of the jury-trial guarantee of the Sixth Amendment, it would not be one for purposes of the Double Jeopardy Clause of the Fifth Amendment, because there is arguably "no principled reason" to say that an offense or element under the former differs from an "offence" or element under the latter. *Sattazahn* v. *Pennsylvania*, 537 U.S. at 111 (opinion of Scalia, J.).

3. In *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam), the Court summarily reversed two decisions of the Ninth Circuit on the ground that they conflicted both with the Sentencing Guidelines and with this Court's double-jeopardy holding in *Witte*. The Court held that a sentencing judge may treat "conduct of which a defendant has been acquitted" as relevant conduct in calculating the Guidelines offense level in a case where the jury returned a partial

acquittal, *id.* at 154, "so long as that conduct has been proved by a preponderance of the evidence," *id.* at 157. Citing several of its decisions, including *Williams* v. *New York*, *supra*, see 519 U.S. at 151-152, the Court observed that it was "well established" under "the pre-Guidelines sentencing regime" that "a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted." *Id.* at 151-152 (quoting *United States* v. *Donelson*, 695 F.2d 583, 590 (D.C. Cir. 1982) (Scalia, J.)). The Court explained that the Guidelines "did not alter this aspect of the sentencing court's discretion," because "relevant conduct" under the Guidelines roughly corresponds to "those actions and circumstances that courts typically took into account when sentencing prior to the Guidelines' enactment." *Ibid.* (quoting *Witte*, 515 U.S. at 402, in turn quoting *Wright*, 873 F.2d at 441). Applying *Apprendi* to the Guidelines could not be reconciled with *Watts* any more than with *Witte*, because a rule that only facts found by a jury can be used to increase a defendant's offense level is directly contrary to *Watts*' holding that an offense level may be increased on the basis of facts that the jury affirmatively *declined* to find.

4. In *Edwards* v. *United States*, 523 U.S. 511 (1998), the defendants were charged with conspiracy to possess, with the intent to distribute, cocaine and cocaine base. The jury returned a general verdict of guilty, after being instructed that it could reach that verdict if it found that *either* drug was the object of the conspiracy. In calculating the defendants' base offense levels, the sentencing judge included both cocaine and cocaine base, with the result that the Guidelines sentences were higher than they would have been if only cocaine had been included. Relying on the drug-conspiracy statute (21 U.S.C. 846), the Due Process Clause, and the Sixth Amendment's jury-trial guarantee, 96-8732 Pet. Br. 11-46, the defendants argued that, because there was no special verdict on the type of drug, the judge should have

treated the verdict as a finding that the object of the conspiracy was cocaine, which is punished more leniently than cocaine base.

In a unanimous opinion, this Court disagreed. Even if the defendants were correct, the Court explained, "it would make no difference to their case," because "the Guidelines instruct a sentencing judge to base a drug-conspiracy offender's sentence on the offender's 'relevant conduct,'" *Edwards*, 523 U.S. at 514, and the judge correctly found that the relevant conduct in that case included both cocaine and cocaine base. The Court went on to say that "[o]f course" the defendants' "statutory and constitutional claims" *would* make a difference if "the sentences imposed exceeded the maximum that the statutes permit for a cocaine-only conspiracy," because "a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines." 523 U.S. at 515 (citing Guidelines § 5G1.1). The defendants' claims did not make a difference in that case because "the sentences imposed were within the statutory limits applicable to a cocaine-only conspiracy." *Ibid.* (citing 21 U.S.C. 841(b)(1)-(3)). *Edwards* thus places dispositive weight on the distinction between a statutory maximum sentence and a Guidelines offense level, and while the opinion did not address whether a jury must find a fact that increases the statutory maximum, it squarely held that the sentencing judge may find facts that increase the Guidelines sentence.

What the Court said in *Edwards* it said again two years later in *Apprendi*. In a footnote near the end of its opinion, immediately after stating that the Sentencing Guidelines were not before the Court and that it was therefore expressing no view on them "beyond what this Court has already held," the Court quoted *Edwards*' statement that the result in that case would have been different if "the sentences imposed exceeded the maximum that the statutes permit for a cocaine-only conspiracy," because "a maximum sentence set by statute trumps a higher sentence set forth in

the Guidelines." *Apprendi*, 530 U.S. at 497 n.21 (quoting 523 U.S. at 515). Recognizing "the links connecting the [S]ixth [A]mendment, *Apprendi*, *Edwards*, statutory maximums, and the * * * Sentencing Guidelines," 04-104 Pet. App. 17a (Easterbrook, J., dissenting), lower courts have "read *Apprendi* as intending to leave undisturbed the rule, described in *Edwards*, that the sentencing judge may properly find facts that move the Guidelines range within the statutory maximum," *Pineiro*, 377 F.3d at 472. This Court could not hold that *Apprendi* applies to the Guidelines without disavowing *Edwards*, as well as *Watts*, *Witte*, and *Dunnigan*, and saying that the Court has "recently discovered a constitutional principle rendering unconstitutional all the sentencing practices affirmed in those decisions." *Emmenegger*, 2004 WL 1752599, at *11. Particularly because the Guidelines fundamentally differ from the Washington statutes to which *Apprendi* was held to apply in *Blakely*, there is no reason for the Court to take the extraordinary step of abandoning four precedents that were decided within the last dozen years.

Indeed, a holding that *Apprendi* applies to the Guidelines would undermine one of the central premises of *Mistretta* itself. If every fact that enhances the offense level under the Guidelines truly creates a "greater offense," then, contrary to *Mistretta*'s rationale for upholding the Guidelines against a separation-of-powers challenge, it would appear that the Sentencing Commission *does* "bind [and] regulate the primary conduct of the public," 488 U.S. at 396; that it *is* engaged in the "business of determining what conduct should be criminalized," *id.* at 407; and that it *does* establish "maximum penalties for every crime," *id.* at 396. See also pp. 63-66, *infra*.[16]

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[16] A decision applying *Blakely* to the Guidelines would also appear to invalidate, on its facts, the result in *Harris* v. *United States*, 536 U.S. 545 (2002), which upheld an increase in a defendant's mandatory minimum sentence from five to seven years based on a judge's finding that the defendant brandished a firearm under 18 U.S.C. 924(c)(1)(A)(ii). As Justice Thomas pointed out in dissent in *Harris*, 536 U.S. at 578 & n.4, the maximum *Guidelines* sentence for a violation of Section 924(c) is the "minimum term required by the relevant statute. . . . A sentence above the minimum term . . . is an upward departure." *Id.* at 578 n.4 (quoting Guidelines § 2K2.4, comment. (n.1) (Nov. 2001)). Given that Guideline, a finding of brandishing by the court increased the permissible maximum Guidelines sentence (absent a departure, which would itself have required additional facts) from five years to seven years of imprisonment.

D. If *Blakely* Would Require That A Guidelines Range Be Treated As A Statutory Maximum, That Aspect Of *Blakely* Should Be Reconsidered

If *Blakely* "redefined 'statutory maximum,'" 04-104 Pet. App. 10a, to omit the word "statutory," such that "an element of a greater offense," *Apprendi*, 530 U.S. at 494 n.19, now means "any fact that increases the upper bound on a judge's sentencing discretion," *Blakely*, 124 S. Ct. at 2546 (O'Connor, J., dissenting), then it would be hard to argue that *Blakely* does not apply to the Guidelines. If the constitutionally relevant maximum sentence is not the maximum set by Congress, but is instead "the maximum sentence a judge may [legally] impose * * * *without* any additional findings" beyond "the facts reflected in the jury verdict or admitted by the defendant," *id.* at 2537 (emphasis omitted), then the Guidelines set maximum sentences. If that is what the Court held in *Blakely*, however, that aspect of its holding is erroneous, and should be reconsidered and rejected.

1. The opinion in *Blakely* offers no direct historical support for broadening the definition of an "element" from a fact that increases the statutory degree of an offense to a fact that raises the upper limit on the sentencing judge's discretion below the maximum set by Congress. The opinion says, for example, that the Court "compiled the relevant authorities in *Apprendi*," 124 S. Ct. at 2536, but that case applied the narrower definition of "element" and adduced no histori-

cal authorities that considered efforts to structure discretion of a sentencing court within the defined minimum and maximum terms, as the Sentencing Guidelines do.

Nor does the majority opinion adequately explain how a broader definition of "element" can be reconciled with the undisputed principle that the jury-trial guarantee does *not* apply to facts that trial judges have historically relied upon to increase a sentence within the statutorily authorized range. The opinion does say that such facts are not subject to the Sixth Amendment because they "do not pertain to whether the defendant has a legal *right* to a lesser sentence." 124 S. Ct. at 2540. But it is not intuitively obvious why that should matter to a defendant whose sentence within a statutory range is *in fact* increased by factual findings by a judge exercising unfettered discretion. While there may be justification for treating distinct conduct that must be shown in order to trigger a distinct and higher statutory maximum as equivalent to a statutory element, it is not the case that every fact that limits the discretion of a sentencing judge satisfies the ordinary definition of "element"—*i.e.*, a "factual component[]," *Monge* v. *California*, 524 U.S. 721, 737 (1998) (Scalia, J., dissenting), or "ingredient[]," *Apprendi*, 530 U.S. at 500 (Thomas, J., concurring), of a criminal offense. Cf. *Harris* v. *United States*, 536 U.S. 545 (2002) (facts that limit judicial discretion by requiring an increased mandatory minimum within the statutory range are not subject to *Apprendi*). And since structured discretionary sentencing did not exist at the time the Bill of Rights was adopted, there is no historical evidence on the question whether a fact of this type should be considered an "element" for purposes of the Sixth Amendment.

The notion that any fact that raises the upper bound on a sentencing judge's discretion within a statutorily designated range is an "element," therefore, is, in the end, little more than an unsupported assumption. Without a clear textual command in the Constitution or compelling historical evi-

dence, both of which are decidedly absent here, there is no warrant for the Court to override a legislative determination that a judge, rather than a jury, may find the facts that limit the judge's discretion to impose a sentence within the statutorily authorized range. Cf. *Harris* v. *United States*, 536 U.S. at 560 (plurality opinion) (conclusion that fact requiring imposition of statutory minimum sentence is not element of offense "might be questioned" if there were "extensive [contrary] historical evidence," but "[t]he evidence on this score * * * is lacking," because mandatory minimums are "for the most part the product of the 20th century").

2. While *stare decisis* is the "preferred course," *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991), this Court has "often noted" that it is not an "inexorable command," *Agostini* v. *Felton*, 521 U.S. 203, 235 (1997) (quoting *Payne*, 501 U.S. at 828)), and if *Blakely*'s reasoning went beyond its facts, that aspect of the decision should be reconsidered. *Blakely* involved a question of constitutional law, and *stare decisis* is "at its weakest" when the Court is interpreting the Constitution, *Agostini*, 521 U.S. at 235, particularly where, as here, the precedent is "both recent and in apparent tension with other decisions," *Harmelin* v. *Michigan*, 501 U.S. 957, 965 (1991) (opinion of Scalia, J.). Indeed, if *Blakely* went beyond *Apprendi* and requires invalidation of the Guidelines, it is not merely in "apparent tension," *ibid.*, but is inconsistent with decisions treating sentence-enhancing facts under the Guidelines as the equivalent of facts that sentencing judges relied upon before the Guidelines were enacted. See Point I.C, *supra*. The Court would thus have to choose between *Blakely*, on the one hand, and *Dunnigan*, *Witte*, *Watts*, and *Edwards*, on the other. The Court in *Blakely* did not repudiate those well-reasoned precedents and offered no reason for doing so. If *Blakely* is limited to cases that involve multiple statutory maximum sentences and judge-found facts that move a defendant from one to the other, then those precedents stand. If a choice is necessary, however, it is an

unnecessary line of reasoning in a single case decided last Term, not the line of cases decided over the last dozen years, that should give way.

3. The proper Sixth Amendment test is more receptive to constitutional judgment about the nature of the particular sentencing system. *Apprendi*'s bright-line test guards against direct legislative erosion of the procedural safeguards that must accompany the proof of "elements," in cases where a legislature has created tiers of maximum sentences distinguished by particular aggravating facts. Systems like the Federal Sentencing Guidelines, however, do not pose the threat of direct legislative usurpation and should not be judged by such a bright-line rule, but instead should be evaluated by considering the overall nature of the system in question and the purposes, history, context, and effects of the particular statute.

Under that approach, the Guidelines are a constitutional means of channeling judicial discretion. The Guidelines responded to a critical problem of unfairness in purely discretionary sentencing. The Sentencing Reform Act emerged from years of careful study about the problems with the discretionary-sentencing regimes that prevailed in the United States for the majority of the twentieth century. One of the most serious criticisms of wholly discretionary sentencing was that it resulted in significant disparities in the sentences imposed on similarly situated defendants, including disparities based on race, ethnicity, and gender. See pp. 3-4, *supra*.

Discretionary sentencing (often coupled with parole) represented a valuable reform compared to statutes that do not allow for individualization of punishment, despite major differences in the way in which defendants commit their crimes. The nation's experience showed that, in sentencing, "justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the

offense together with the character and propensities of the offender." *Pennsylvania ex rel. Sullivan* v. *Ashe*, 302 U.S. 51, 55 (1937). The Sentencing Guidelines accomplish that aim, by channeling a court's consideration of a wide variety of factors that traditionally influenced a sentencing court's discretion. The Guidelines thus offer a mechanism for minimizing the disparities and discrimination inherent in fully discretionary sentencing, while providing the proportionality lacking in determinate sentencing with only one or a few sentences available for every defendant convicted of a particular offense. Protection of the constitutional values underlying *Apprendi* does not require the Court to invalidate that federal system of sentencing reform, which serves vital interests of fairness and equality in criminal justice and which the Court has repeatedly sustained against a variety of constitutional challenges.

II. IF *BLAKELY* IS HELD TO APPLY TO THE GUIDELINES, THE GUIDELINES CANNOT BE APPLIED AS BINDING SENTENCING RULES IN CASES WHERE JURY FACTFINDING WOULD BE REQUIRED

If the Court concludes that the principles of *Blakely* preclude judges from finding a fact (other than a prior conviction), absent the defendant's consent, when that fact increases the maximum Guidelines sentence, then the current system of sentencing under the Guidelines—with judges determining the facts that both increase and decrease the Guidelines sentence—cannot be applied. In that event, the lower courts will be in desperate need of guidance and this Court must determine what sentencing process should govern in federal criminal cases. In light of the integrated sentencing system it envisioned, Congress would not have intended the Guidelines to be applied as though they created "elements" of an array of offenses, to be administered in part by juries and in part by judges, operating under different

standards of proof. Congress addressed perceived problems with disparities in *judicial* sentencing and sought to channel *judges'* discretion; it did not intend to vest juries with unprecedented authority in the sentencing process. Congress likewise clearly sought to refocus the sentencing process; it did not intend for the Commission effectively to rewrite the federal criminal code by adding multiple new elements to existing crimes.

The Sentencing Commission, as well, would not have intended that a truncated and one-sided version of the current Sentencing Guidelines, which would result from overlaying *Blakely* methods of charging and proof, should govern federal sentencing. The procedural questions that would have to be resolved to operate such a system are daunting, and there is no source of legislative guidance to answer them. Equally important, treating the Sentencing Commission's work product as "elements" raises difficult constitutional questions about the role of the Commission in defining crimes.

For those reasons, in any case in which the Constitution prohibits the judicial factfinding procedures that Congress and the Commission contemplated for implementing the Guidelines, the Guidelines as a whole become inapplicable. In such cases, a judge would have to impose sentence within the statutory maximum and minimum terms, treating the Guidelines as advisory. That approach would leave Congress free to reconstruct a sentencing system to achieve its goals in a manner consistent with constitutional requirements.

A. Severability Analysis Turns On The Intent Of The Legislature And The Commission, And On Whether The Severed Provisions Are Operable As A Law

1. "The inquiry into whether a statute is severable is essentially an inquiry into legislative intent." *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999). The governing principle is that "[u]nless it is evident

that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Alaska Airlines* v. *Brock*, 480 U.S. 678, 684 (1987) (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976) (per curiam)).

The inquiry into legislative intent does not turn solely on whether a severed statute can be said to achieve Congress's *purposes* in enacting the law. Because "severance is based on the assumption that Congress would have intended the result," *Tuan Anh Nguyen* v. *INS*, 533 U.S. 53, 72 (2001), the "relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress" after the unconstitutional provision has been severed, *Alaska Airlines*, 480 U.S. at 685. See, *e.g.*, *Mille Lacs Band*, 526 U.S. at 191 (declining to sever invalid portion of Executive Order because order "embodied a single coherent policy"). Thus, Congress's means of achieving particular goals, as well as its ultimate ends, must be considered.

In addition, what is left after the offending provision is severed must be "fully operative as a law." *Alaska Airlines*, 480 U.S. at 684. Even when a statute contains a severability clause, a court "cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole." *Railroad Ret. Bd.* v. *Alton R.R.*, 295 U.S. 330, 362 (1935). If a statute cannot be made operative without judicial rewriting, severance is impossible, because "Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently." *Alaska Airlines*, 480 U.S. at 684.

2. Application of *Blakely* to the Guidelines would invalidate not only certain provisions of a statute (the Sentencing Reform Act), but also certain provisions of a regulatory scheme (the Sentencing Guidelines) promulgated by the United States Sentencing Commission. Accordingly, the

severability analysis must take into account the intent of the Sentencing Commission as well as Congress's. That is so for two reasons.

First, although the Sentencing Reform Act itself imposed certain requirements on the content and structure of what became the Sentencing Guidelines, Congress also clearly intended that the guidelines produced by the Sentencing Commission—not some substantially different set of rules—should govern criminal sentencing. For that reason, if the Court concludes that the Sentencing Commission would not have promulgated the system it did had it known of the impermissibility of judicial factfinding—that is, if the Commission would not have produced the current Guidelines with an overlay of jury factfinding—then creating such a system through severability analysis would thwart Congress's intent that sentencing be in accordance with a system of the Commission's design.

Second, settled principles governing administrative severability support the conclusion that the intent of the Sentencing Commission, as well as that of Congress, is important. In *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281 (1988), this Court held that a portion of a regulation promulgated by the Secretary of the Treasury was inconsistent with the governing statute. The Court then reached the severability question, concluding that "[t]he design of the regulation is such that the [invalidated subsection] is severable." *Id.* at 294. The Court explained that severability turns not merely on whether the statute could operate without the severed provision ("[t]he severance and invalidation of this subsection will not impair the function of the statute as a whole," *ibid.*), but also on whether the Secretary would have promulgated the regulation without the severed provision ("there is no indication that the regulation would not have been passed but for its inclusion," *ibid.*). Earlier cases also declined to sever individual portions of a regulatory scheme where the effect would be to substitute the Court's judg-

ment on matters of policy for the agency's. See *Federal Power Comm'n* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952). As the Court explained in *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 618-619 (1944), "[i]t would be the sheerest guesswork to believe that elimination of an important factor in the Administrator's equation would have left his equation unaffected even if he did not here insist upon its importance."

B. Congress Would Not Have Intended The Guidelines System To Be Administered With A Requirement Of Jury Findings For Sentence-Enhancing Facts

1. The Sentencing Reform Act makes clear that the Guidelines should be applied at sentencing by the court, not the jury. Congress was responding to a perceived problem with *judicial* sentencing. The Sentencing Commission was authorized to "promulgate and distribute to all courts of the United States * * * guidelines, as described in this section, *for use of a sentencing court* in determining the sentence to be imposed in a criminal case." 28 U.S.C. 994(a)(1) (emphasis added). Congress further instructed the Commission to consider, in formulating the Guidelines, the extent to which various factors were relevant to "an appropriate sentence" and to "take them into account," insofar as they are relevant, including: "the circumstances under which the offense was committed which mitigate *or aggravate* the seriousness of the offense," "the nature and degree of the harm caused by the offense," and the defendant's "role in the offense." 28 U.S.C. 994(c)(2) and (3) (emphasis added), 994(d)(9). Congress necessarily anticipated that, to the extent that the Commission found such facts relevant, the "sentencing court" (28 U.S.C. 994(a)(1))—not the jury—would make the factual findings on the issues that determine a sentence under the Guidelines.

The provisions governing appeal similarly establish that Congress deliberately provided for guidelines that would be

applied based on factfinding by the sentencing court, not a jury. Congress provided that courts of appeals "shall give due regard to the *opportunity of the district court* to judge the credibility of the witnesses, and shall accept *the findings of fact of the district court* unless they are clearly erroneous and * * * shall give due deference to the *district court's application of the guidelines to the facts.*" 18 U.S.C. 3742(e)(4) (emphasis added).[17] Those standards are plainly directed to the review of determinations by sentencing courts; the statute makes no provision for review of jury verdicts. Indeed, Congress provided for equal rights of appeal for the government and the defendant, 18 U.S.C. 3742(a) and (b), even though government appeals of adverse jury findings at a criminal trial are ordinarily precluded by the Double Jeopardy Clause. *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564 (1977).

The legislative history also leaves no doubt that Congress intended judges to find the facts that underlay the application of the Guidelines. Congress was responding to perceived problems with the sentences imposed by judges, not juries, and so the Senate Report made clear that the projected guidelines "are designed to structure *judicial* sentencing discretion." Senate Report 65 (emphasis added). See also *id.* at 52 ("the bill requires *the judge*, before imposing sentence, to consider the history and characteristics of the offender, the nature and circumstances of the offense, and the purposes of sentencing") (emphasis added); *id.* at 75 ("*the judge* must consider such things as the amount of harm done by the offense, whether a weapon was carried or used, whether the defendant was a lone participant in the offense or participated with others in a major or minor way,

[17] The "due regard" and "clear error" clauses were part of the original Sentencing Reform Act. *Koon* v. *United States*, 518 U.S. 81, 97 (1996). The "due deference" clause was added in 1988. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Tit. VII, Subtit. C, § 7103(a)(7), 102 Stat. 4417.

and whether there were any particular aggravating or mitigating circumstances surrounding the offense") (emphasis added). The Report nowhere discusses the manifold procedural complications that would have arisen if juries were to decide sentencing issues that had traditionally been resolved by judges.

The Sentencing Commission heeded Congress's directive and designed the Guidelines for application by judges at sentencing, not by juries at trial. The Guidelines Manual "directs the court, once it has determined the applicable [offense conduct] guideline * * * to determine any applicable specific offense characteristics * * * and any other applicable sentencing factor." Guidelines § 1B1.2, comment. (n.2). See also *id.* § 1B1.2(b) (provision clearly directed to courts (not juries) to "[d]etermine" facts relevant to application of the Guidelines). The Guidelines also indicate that the court shall resolve disputed facts based on any reliable evidence, without regard to its admissibility at trial, *id.* § 6A1.3(a), and under a preponderance of the evidence standard, *id.* § 6A1.3, comment. It is thus clear that Congress conceived and the Commission implemented the Guidelines as a means of controlling judicial discretion, not as a means of converting traditional sentencing factors into elements to be found by juries.

2. Severing the requirement of judicial application of the Guidelines for sentence-enhancing facts and substituting a requirement of jury finding of such facts would severely distort the operation of the Guidelines. It would also severely compromise Congress's fundamental goals of eliminating unwarranted disparities among similarly situated defendants and ensuring the proportionality of the sentence to the crime. See 28 U.S.C. 991(b)(1)(B), 994(m); Senate Report 52, 61. And it would defeat the Sentencing Commission's methodology for achieving those same goals and ensuring an appropriate sentence for each defendant.

a. *Severing judicial factfinding on sentence-enhancing facts would be inconsistent with the structure of the Guidelines as a cohesive whole.* The Guidelines system embodies a "single, coherent policy" in which each of the important features—including application by judges, not juries—"performs an integral function." *Mille Lacs Band*, 526 U.S. at 191-192. The provision for judicial factfinding under the Guidelines is "so interwoven" with the other substantive and procedural provisions that it "can not be separated." *Hill* v. *Wallace*, 259 U.S. 44, 70 (1922).

(*i*). Congress intended that the Guidelines should account for both mitigating and aggravating factors in determining each defendant's sentence. 28 U.S.C. 994(c)(2). To that end, the Commission promulgated a detailed and calibrated system of guidelines, taking into account a great many factors to channel a sentencing court's decision-making. The application of any given Guidelines provision (enhancement or reduction) has its intended effect on a sentence only when combined with a conclusion that other Guidelines enhancements and reductions do or do not apply in the individual case. See pp. 29-32, *supra*. Thus, the Commission recognized that, for the Guidelines to work as intended, they must be applied as a cohesive whole. See Guidelines § 1B1.11(b)(2) ("The Guidelines Manual in effect on a particular date shall be applied in its entirety.").

The Sentencing Commission clearly did not set base offense levels or fashion adjustments to those levels to account for an asymmetrical factfinding regime, under which enhancements would be applicable if a jury found them present beyond a reasonable doubt, while reductions would be applicable if the court found them present by a preponderance of the evidence. Altering the system by requiring a different factfinder—and a different standard of proof—for sentence enhancements would fundamentally distort the system.

(*ii*). If the Commission had understood that the government would have the burden of establishing a particular enhancing fact beyond a reasonable doubt, it might have modified the *substance* of the enhancement to account for the increased burden and difficulty of establishing that fact. For example, intent, purpose, or other mental-state requirements to establish various enhancements might have been reduced or modified.[18] Or the Commission might have increased base offense levels for particular guidelines across the board and allowed the defendant, for specified reasons, to seek *mitigation* of the Guidelines range, in a proceeding before a judge in which the defendant bore the burden of proof. Congress might have taken similar action if it had desired to stiffen sentences for certain crimes. Countless provisions of the Guidelines thus might have been crafted differently, in order to account for the asymmetrical difficulty that the government would encounter in meeting its burden of proof, and the increased administrative costs of affording a jury trial.

This Court made a similar point in *Patterson* v. *New York*, 432 U.S. 197 (1977). In that case, the Court noted that "in revising its criminal code, New York provided the affirmative defense of extreme emotional disturbance, a substantially expanded version of the older heat-of-passion concept; but it was willing to do so only if the facts making out the defense were established by the defendant with sufficient certainty." *Id.* at 207. "The State," the Court noted, "was itself unwilling to undertake to establish the absence of those facts beyond a reasonable doubt, perhaps fearing that proof would be too difficult and that too many persons deserving treatment as murderers would escape that punishment." *Ibid.* Under the Sentencing Guidelines, the burdens placed on the government to obtain a particular sentence were

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[18] See Guidelines §§ 2B1.1(b)(5), 2B1.5(b)(4), 2C1.1(c), 2Q1.6(a)(3), 2S1.1(b)(1), 2S1.3(b)(1), 2T1.9(b)(2).

fashioned in light of the understanding that the government would have to meet a preponderance standard, in a showing to a judge unconstrained by formal rules of evidence. See Sentencing Guidelines § 6A1.3 & comment. ("The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case."). It is not knowable what alterations the Commission might have made to the Guidelines to account for the risk that a jury-trial right and a burden of proof beyond a reasonable doubt on facts that increase a sentence would result in potentially inadequate sentences.

The existing fraud Guidelines provisions provide an example. A defendant convicted of fraud is subject to a base offense level of 6 or 7, see Guidelines § 2B1.1(a), which translates into a sentencing range of 0-6 months of imprisonment at a low criminal history category. That level corresponds to the smallest-scale frauds, which result in a loss of $5000 or less. The base offense level then is enhanced up to 30 levels for the amount of fraud if that amount is more than $5000. See *id.* § 2B1.1(b)(1). That level can be further enhanced for numerous factors such as the targeting of a particularly vulnerable group of victims, see *id.* § 3A1.1(b), and it can also be reduced for other factors such as acceptance of responsibility, see *id.* § 3E1.1. If enhancing factors had to be found by juries beyond a reasonable doubt, the Sentencing Commission may well have chosen to account for the increased difficulty of proving enhancements by setting the base offense level to accord with the average—not the smallest-scale—offense, or the Commission may have otherwise restructured and reweighed the various enhancing and reducing factors so that the ultimate sentence is proportionate to the crime.

(*iii*). The distorting effects of superimposing a partial system of jury factfinding on the existing Guidelines are

vividly illustrated by any pending cases in which the defendant awaits sentencing and cannot, for double-jeopardy or other reasons, be subject to a new sentencing hearing. Fraud defendants in that situation who are in a low criminal history category—from the small-time scam artist to the multimillion dollar swindler—would all likely be subject to a sentencing range of 0-6 months' imprisonment, despite the substantial differences in their offenses. But neither Congress nor the Sentencing Commission ever contemplated that all fraud defendants would be treated alike or that the most culpable offenders would be treated so leniently. See *United States* v. *Einstman*, No. 04-CR. 97 (CM), 2004 WL 1576622, at *6 (S.D.N.Y. July 14, 2004) ("[I]t seems evident * * * that Congress would never have countenanced a Guidelines system in which all first-time offenders who pled guilty to the elements of wire, mail or bank fraud, and nothing more, were limited to a sentence of 0-6 months * * * without regard to the amount of the fraud, its sophistication, or the role played by the defendant in the conspiracy.").

(*iv*). In the rare instance where an enhanced burden of proof and jury trial right were desired, the Guidelines specifically provide for them. In providing for a hate-crime enhancement, the Guidelines require that "the finder of fact at trial or, in the case of a plea of guilty * * *, the court at sentencing" make a determination on the issue of biased selection of the victim "beyond a reasonable doubt." Guidelines § 3A1.1(a). The provision was promulgated in response to a congressional directive that specified that the facts were to be determined by "the finder of fact at trial" under the increased burden of proof. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Tit. XXVIII, § 280003, 108 Stat. 2096. The substance of the hate-crime provision was thus deliberately framed in light of an intention that the government would bear the burden of proof at a jury trial. The same cannot be said of the vast

majority of Guidelines provisions, whose drafters assumed that normal rules of sentencing procedure applied, *i.e.*, resolution by the judge, under the preponderance standard, without formal evidentiary rules.

b. *Severing judicial factfinding on sentence-enhancing facts would make the resulting system unfeasibly complex.* Typically, juries are called upon to make a limited number of focused factual determinations on the elements of an offense in order to decide whether a defendant is guilty. The sudden addition of numerous Guidelines enhancements to the list of facts that juries must decide could dramatically complicate the task of instructing juries and obtaining valid verdicts. A bank robbery case, for example, could require

> a jury to determine factors regarding the nature of the offense [under Guidelines § 2B3.1] such as (1) the nature of the institution robbed; (2) the presence of, brandishing of, or other use of, a firearm; (3) the making [of] a death threat; (4) the presence of ordinary, serious, or permanent or life threatening bodily injury; (5) any abduction; (6) any physical restraint; (7) the taking of a firearm[;] (8) the taking of drugs; and (9) and the value of property taken[.]

United States v. *Croxford*, 324 F. Supp. 2d 1230, 1254 (D. Utah 2004). Additional adjustments under Chapter 3 of the Guidelines that would have to go to the jury might include the defendant's role in the offense; abuse of a position of trust; use of a special skill; use of a minor; terroristic motivation; or obstruction of justice. *Ibid.*

The inevitable result of requiring a jury to make so many determinations, many of them of great complexity, would be, in some cases, jury confusion and a decrease in the accuracy of jury factfinding. That in turn would lead to a decrease in sentencing uniformity and in proportionality between the seriousness of the crime and the length of sentence imposed. Both the decrease in uniformity and the decrease in proportionality would be directly contrary to Congress's intent that the Guidelines would avoid unwarranted disparities and ensure just punishment. See p. 49, *supra*.

Those consequences would also be contrary to the Sentencing Commission's intent in promulgating its detailed and nuanced set of Guidelines. When the Commission first formulated the Guidelines, it recognized that it was able to craft a relatively complex set of sentencing factors in the Guidelines because judges, rather than juries, were to administer the system:

> In determining guilt or innocence, a jury often is presented with many complex factual issues, but ultimately a relatively small number of factual elements may suffice to support conviction. Sentencing, on the other hand, can require attention to many more discrete factual issues. These receive increased emphasis in a guideline system. A fact-finding process for sentencing decisions that has all the attributes of a formal trial could consume many times the resources devoted to the resolution of guilt or innocence. *Ultimately, such an approach would render the sentencing process completely unworkable.*

United States Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* ch. 6, at 45 (June 18, 1987) (emphasis added). While the Commission endeavored "to focus on a relatively manageable number of frequently-occurring factors and to avoid an effort to attribute specific sentencing weight to every conceivable nuance," *id.* at 46, and believed that "[t]he sentencing factors also tend to be those that are closely tied to elements of the offense (*e.g.*, nature of injury, amount of loss), thus ensuring that evidence relating to them will be adduced in the event of a trial," *id.* at 46 n.78, litigation of factual issues surrounding the Sentencing Guidelines is in fact often a complicated task involving many facts that are not resolved in adjudicating the elements of the offense.

c. *Severing judicial factfinding on sentence-enhancing facts would make some provisions of the Guidelines difficult or impossible to apply.* Many provisions of great importance under the Guidelines could not be implemented if enhancing factors had to be charged in an indictment and submitted to a jury. Sentencing courts have traditionally relied on facts at sentencing that became known only at trial or later, and Congress clearly intended that the courts could continue to use that practice under the Guidelines. Yet that practice would become impossible if enhancing factors had to be charged in an indictment and then proved to a jury. For example, the Guidelines enhancement for obstruction of justice under Section 3C1.1 can be based on a defendant's false testimony at trial. See *Dunnigan*, 507 U.S. at 95-96. Because the government cannot know at the time of indictment whether the defendant will lie on the stand, that enhancement would be impossible to apply. Other enhancing facts may emerge at trial or when a presentence report is prepared; those, too, would have to be omitted from the sentencing calculation, even though they may shed important light on a given offense or offender. And upward departures not specified in the Guidelines would presumably be entirely unavailable. See Guidelines § 5K2.0. Where the Commission had not specified an upward departure ground in advance of the defendant's conduct, it is doubtful that due process would allow specification of that fact at a later time to serve as a basis for increasing a defendant's maximum sentence.

The "relevant conduct" rules would also create a quagmire for judge, jury, and defendant alike. See pp. 29-30, *supra*. As a former Commissioner and General Counsel of the Sentencing Commission have stated, relevant conduct is the "cornerstone" of the Guidelines.[19] Yet relevant conduct can-

[19] William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. Rev. 495 (1990); see also Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 8-12 (1990).

not be reconceptualized as an element of an offense. Instructing a jury on these matters would itself present enormous difficulties. See Guidelines § 1B1.3, comment. (eight-page application commentary). But more fundamentally, injecting the relevant-conduct rules into a criminal trial would take the trial far afield of where it belongs—focused, that is, on whether the defendant committed the crime with which he was charged. See *Williams*, 337 U.S. at 246-247 (rules of evidence aim to prevent time-consuming and confusing trial on collateral issues, and to prevent factfinder from "being influenced to convict for [the charged] offense by evidence that the defendant had habitually engaged in other misconduct"). The effect would be to convert virtually every federal crime into a "conspiracy" or "scheme" offense. Much evidence might become admissible that would be extremely prejudicial to a defendant. See *Monge*, 524 U.S. at 729. There is no indication that Congress (or the Commission) intended such a far-reaching transformation of federal criminal trials.

d. *Severing judicial factfinding on sentence-enhancing facts would convert the Guidelines system into a charge-offense system.* As the Commission explained when it first promulgated the Guidelines, "[o]ne of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ('real offense' sentencing), or upon the conduct that constitutes the elements of the offense with which the defendant was charged and of which he was convicted ('charge offense' sentencing)." Guidelines § 1A1.1 note Pt. A, 4(a). The Commission noted that the pre-Guidelines practice was "a real offense system," because "[t]he sentencing court

(and the parole commission) take account of the conduct in which the defendant actually engaged." *Ibid.* The Commission also explained that a serious drawback of a real-offense system is its complexity, while a serious drawback of a charge-offense system "is its potential to turn over to the prosecutor the power to determine the sentence," by, for example, altering the number of counts charged. *Ibid.*

The Commission in the end adopted a hybrid system that begins its calculation with the charged offense, but which "has a number of real offense elements." Guidelines § 1A1.1 note Pt. A, 4(a). Among those are numerous specific offense characteristics that go beyond the charged conduct. Prominent examples include drug quantity in narcotics cases and loss in fraud cases. *Id.* §§ 2D1.1, 2B1.1. Equally prominent are Chapter Three adjustments for factors such as victim-related aggravators, role in the offense, obstruction of justice, and multi-count adjustments. Guidelines Ch. 3, Pts. A, B, C, and D. Over time, the Commission has added more "real offense" components to the Guidelines.[20]

Replacing the court's traditional role as factfinder at sentencing with a requirement that juries find sentence-enhancing facts would convert the system into a virtually pure charge-offense system, thereby fundamentally altering the balance struck by the Commission. Any sentence-enhancing fact that was constitutionally required to be proved to a jury would first have to be charged in an indictment or (with the defendant's consent) an information. See *United States* v. *Cotton*, 535 U.S. 625, 627 (2002) (stating, after quoting the rule in *Apprendi*, that "[i]n federal prosecutions, such facts must also be charged in the indictment"). A wholesale charge-offense system would render courts incapable of ensuring that similar conduct by defendants received consistent treatment at sentencing, because courts would have no control over what real-offense "elements" were charged. There is no basis for concluding that the Commission would have structured the Guidelines in the same fashion had it realized that its efforts comprehensively to instill real-offense components into the Guidelines were doomed.

[20] See Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 Nw. U. L. Rev. 1342, 1354-1361 (1997).

3. Taking into consideration the integrated structure of the Guidelines as a set of balanced downward and upward adjustments; the complexity that would be foisted on the system in the trial of at least some cases if Guidelines factors were treated as elements; the abridged application of many Guidelines provisions under an indictment and jury-trial regime; and the transformation of the system into virtually a pure charge-offense system, there is ample reason to conclude that Congress and the Commission did not intend for the system to function in such a manner. While a determinate sentencing system is not incompatible with *Blakely*, 124 S. Ct. at 2540, the current Guidelines system was not designed to operate under *Blakely*'s constraints. Overlaying *Blakely*'s requirements on the Guidelines would produce sentences that no policymaker intended or believed appropriate.

C. Administering Jury Factfinding Under The Guidelines Would Require Procedural Innovation Far Greater Than Is Permissible

The Sentencing Reform Act and the Sentencing Guidelines provide no guidance about how to administer the system if defendants have a right to a jury determination of sentence-enhancing factors. Because there is no provision in the applicable statutes, guidelines, or rules that addresses the numerous procedural issues that would have to be resolved, the statute does not "function[] independently" and would not be "fully operative as a law," *Alaska Airlines*, 480

U.S. at 684, without the existing procedures for judicial determination of the facts.

Under the current system, the Guidelines are to be provided "for the use of a sentencing court in determining the sentence to be imposed in a criminal case." 28 U.S.C. 994(a)(1). Generally, a defendant is not sentenced until after the preparation of a presentence report, which develops the facts and calculates the applicable Guidelines range. Fed. R. Crim. P. 32(c) and (d). If the parties have made objections, "[a]t sentencing the court * * * must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute" if it will affect or be considered in sentencing. Fed. R. Crim. P. 32(i)(3)(B). If *Blakely* applies to the Guidelines, those procedures will be unconstitutional for resolution of contested sentencing-enhancing facts, and there is no statutory, guidelines, or rule-based system to put in their place. In theory, courts could fill the resulting gap by instituting a court-designed system of jury findings on sentence-enhancing facts under the beyond-a-reasonable-doubt standard, to be supplemented by judicial findings on facts that reduce the sentence under the preponderance standard. But that system would require a court not merely to sever an unconstitutional provision, but to "amend the act," *Hill* v. *Wallace*, 259 U.S. at 71, a course that the Court has previously declined to undertake.

In *United States* v. *Jackson*, 390 U.S. 570, 576-579 (1968), the Court considered a provision of the Federal Kidnapping Act that authorized a sentence of death only when the jury so recommended. *Id.* at 571-572. The Court held that the provision unconstitutionally burdened the defendant's right to have a trial and to seek a jury. *Id.* at 581-582. The government proposed that the statute could be rescued from constitutional infirmity by reading it to authorize "by implication" the "convening [of a] special jury * * * for the sole purpose of deciding whether [the defendant] should be

put to death" in a case in which the defendant had pleaded guilty or waived jury trial. *Id.* at 576-577.

Noting that there was not "the slightest indication that Congress contemplated any such scheme," the Court rejected the government's proposal. *Jackson*, 390 U.S. at 578. The Court explained that "it would hardly be the province of the courts to fashion [such] a remedy" and that "[a]ny attempt to do so would be fraught with the gravest difficulties." *Id.* at 579. Among the difficult questions that courts would have to resolve would be:

> If a special jury were convened to recommend a sentence, how would the penalty hearing proceed? What would each side be required to show? What standard of proof would govern? To what extent would conventional rules of evidence be abrogated? What privileges would the accused enjoy?

Ibid. The Court explained that "[i]t is one thing to fill a minor gap in a statute," but "quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality." *Id.* at 580.

Replacing the statutory gap in the Guidelines system with a novel system of jury trials for sentence-enhancing facts would be fraught with the same grave difficulties as in *Jackson*. Indeed, it would require judicial legislation on a far greater scale than the approach rejected in *Jackson*, because the Guidelines apply in every federal criminal prosecution. Without any guidance from Congress, courts would have to determine how sentencing factors are to be alleged in an indictment;[21] whether trials would have to be bifurcated into

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[21] Federal Rule of Criminal Procedure 7(c)(1) states that the indictment "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged." It does not make any

guilt and sentencing phases;[22] whether the Rules of Evidence would apply at the new proceedings, notwithstanding Congress's intent that they not apply at sentencing;[23] whether a defendant could plead guilty to the underlying offense while reserving a right to a jury on sentence-enhancing facts, and whether, if so, the defendant could still be eligible for acceptance-of-responsibility credit under Guidelines § 3E1.1; whether and what kind of discovery would be permitted on sentence-enhancing facts;[24] whether the government or the defendant would be entitled to lesser-included-offense instructions if a jury could rationally find the defendant guilty of the charged crime, yet reject a sentence-enhancing fact;[25] and whether a jury's inability to

provision for charging Sentencing Guidelines factors, and does not indicate whether they must (or must not) be charged in a particular count.

[22] Current federal law provides for bifurcation only in capital cases. See 18 U.S.C. 3593(b).

[23] See 18 U.S.C. 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."); Fed. R. Evid. 1101(d)(3) (Federal Rules of Evidence not applicable in sentencing proceedings).

[24] Federal Rule of Criminal Procedure 16(a)(1)(F)(iii) authorizes discovery when an item is, *inter alia*, "material to preparing the defense or the government intends to use the item in its case-in-chief at trial." In *United States* v. *Armstrong*, 517 U.S. 456, 462 (1996), the Court construed the term "defense" in a predecessor discovery provision (Rule 16(a)(1)(C)) to encompass only material that supports "'shield' claims, which refute the Government's arguments that the defendant committed the crime charged."

[25] Federal Rule of Criminal Procedure 31(c)(1) provides that "[a] defendant may be found guilty of * * * an offense necessarily included in the offense charged." Under *Schmuck* v. *United States*, 489 U.S. 705, 716 & n.8 (1989), a defendant is entitled to a lesser-included-offense instruction if "the elements of the lesser offense are a subset of the elements of the charged offense" and the trial evidence would permit a rational jury "to

agree on a sentence-enhancing fact would require retrial on the entire case, on all sentence-enhancing facts, or just on the single fact on which agreement was not reached. Severing the requirement that judges, not juries, apply the Guidelines would require courts to make the legal and policy decisions necessary to resolve all of those questions. There is no indication that Congress delegated that role to the courts. It is one thing to recharacterize a single factor that increases a statutory maximum and treat it as an element of the crime. It is quite another to take an entire system expressly designed to channel sentencing discretion and treat it as if Congress was attempting to rewrite the criminal code. Accordingly, if *Blakely* invalidates judicial factfinding on sentence-enhancing facts, it cannot be said that the Sentencing Guidelines would continue to "function[] independently." *Alaska Airlines*, 480 U.S. at 684.

D. The Conversion Of The Sentencing Guidelines Into "Elements" Would Raise Serious Constitutional Questions

To treat Guidelines factors as permissibly raising maximum penalties within the meaning of *Apprendi* is to equate those factors, for constitutional purposes, with elements of a criminal offense. *Apprendi*, 530 U.S. at 494 n.19. Severing the Sentencing Reform Act so as to treat Guidelines factors as "elements" would not only ignore Congress's intent to reform judicial sentencing, rather than to rewrite the criminal code, it would also raise serious constitutional problems. It is a "cardinal principle" of this Court's jurisprudence that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.* v. *Florida Gulf*

find the defendant guilty of the lesser offense, yet acquit him of the greater."

Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

1. A critical premise of this Court's decision upholding the Sentencing Reform Act in *Mistretta* v. *United States*, 488 U.S. 361 (1989), was that "[a]lthough the Guidelines are intended to have substantive effects on public behavior (as do the rules of procedure), they do not bind or regulate the primary conduct of the public or vest in the Judicial Branch the legislative responsibility for establishing minimum and maximum penalties for every crime." *Id.* at 396. The Court instead understood that the Guidelines "do no more than fetter the discretion of sentencing judges to do what they have done for generations—impose sentences within the broad limits established by Congress." *Ibid.*

That understanding would be called into question if some enhancing factors set forth in the Guidelines had to "be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi*, 530 U.S. at 476 (quoting *Jones* v. *United States*, 526 U.S. 227, 243 n.6 (1999)). In that event, those enhancing facts would be "functional[ly] equivalent" to elements of offenses. *Id.* at 494 n.19. Contrary to *Mistretta*'s premise that Guidelines adjustments merely "fetter the discretion of sentencing judges," such Guidelines factors could be seen to "establish[] * * * maximum penalties for every crime," 488 U.S. at 396, and directly affect primary conduct, *Blakely*, 124 S. Ct. at 2540; *Apprendi*, 530 U.S. at 476.

Mistretta upheld the constitutionality of locating the Sentencing Commission in the Judicial Branch, and of authorizing the participation of federal judges, because of the "unique context of sentencing," 488 U.S. at 395, in which there has been a "consistent responsibility of federal judges to pronounce sentence within the statutory range *established by Congress*," *id.* at 391 (emphasis added). In contrast to the longstanding judicial role in sentencing, however, the definition of crimes, and the establishment of statutory maximum terms for offenses, has never been the domain of federal judges. Early on, it was established that federal judges lacked the authority to define common law crimes. *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812). Rather, "[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence." *Ibid.* See *Staples* v. *United States*, 511 U.S. 600, 604 (1994) (definitions of criminal offenses entrusted to the legislature, "particularly in the case of federal crimes, which are solely creatures of statute"). Accordingly, it would be a significant constitutional step beyond *Mistretta* to hold that federal judges may participate in a commission empowered to enact supplementary elements of basic and enhanced offenses that will govern the primary conduct of citizens.

2. There is no indication that Congress intended to take that step. For more than a decade before enacting the Sentencing Reform Act, Congress extensively considered comprehensive criminal-code reform, which would have rationalized the disparate provisions of federal criminal law, but the legislation ultimately failed to pass.[26] Instead, Congress enacted the Sentencing Reform Act in order to establish a *sentencing* system—which would operate within the congressionally defined maximums in the United States Code, see, *e.g.*, 28 U.S.C. 994(b)(1), and which would take into account not just the elements of an offense set by Congress, but the manifold factors that had traditionally informed a judge's sentencing discretion. See, *e.g.*, 28 U.S.C. 994(m) (directing Commission to canvass prior sentencing practice

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[26] Since 1971, the House and Senate Judiciary Committees had been considering legislation to recodify, reclassify, and streamline the patchwork of federal criminal statutes that had proliferated over the years. See Nat'l Comm'n on Reform of Federal Criminal Laws, Final Report (1971). This effort to codify federal criminal law was abandoned in the early 1980s. Robert H. Joost, *Viewing the Sentencing Guidelines as a Product of the Federal Criminal Code Effort*, 7 Fed. Sent. Rep. 118 (1994).

in various categories of cases); 28 U.S.C. 994(r) (requiring Commission to "*recommend* to the Congress that it raise or lower the grade, or otherwise modify the maximum penalties, of those offenses for which such an adjustment appears appropriate") (emphasis added). Congress did not view the Commission's task as creating a new breed of criminal offenses or altering existing statutory maximums.

3. Particularly in light of that history, the Sentencing Reform Act should not be construed or severed so as to raise constitutional concerns about the role of the Sentencing Commission. Congress's intent in authorizing the promulgation of guidelines was for the Commission to guide the process by which judges have always imposed sentences and thereby produce a more rational, uniform, and proportionate sentencing system. *Mistretta*, 488 U.S. at 395-396. Its intent was not for the Commission to redefine the maximum sentences to be imposed for federal crimes and create separate elements for aggravated versions of such crimes. Nor is it clear that such a task could constitutionally be entrusted to a body in the Judicial Branch. The need to avoid the creation of constitutional doubt provides a strong reason not to overlay a system of jury factfinding on the Guidelines.

E. The Appropriate Remedy Would Be To Hold The Guidelines As A Whole Inapplicable In A Case In Which The Guidelines Would Require The Court To Find A Sentence-Enhancing Fact

1. If the Court accepts the claim that *Blakely* prohibits judicial factfinding that increases the Guidelines sentence, the Guidelines must rise or fall as a whole. For the reasons given above, any unconstitutional requirement of judicial factfinding under the Guidelines cannot properly be severed from the remaining sentencing system created by Congress and the Commission. Accordingly, a holding that *Blakely* applies to the Guidelines would require the conclusion that the system contemplated by Congress and created by the

Commission would be inapplicable in a case in which the Guidelines would require the sentencing court to find a sentence-enhancing fact. The consequence of such a holding would be that the maximum sentence authorized by the jury verdict or guilty plea would be the maximum that Congress established for the offense of conviction. The sentencing court would have discretion to impose a sentence within the statutory minimum and maximum terms.

In such sentencings, the Guidelines would remain as advisory factors for the court to consider. Any constitutional infirmity in judicial factfinding that mandates an increase in a Guidelines sentence would not invalidate 18 U.S.C. 3553(a). That provision defines the purposes of sentencing and requires a judge to impose a sentence "sufficient, but not greater than necessary," to comply with those statutory purposes. 18 U.S.C. 3553(a). Section 3553(a) also requires the court to consider a variety of factors, including "the nature and circumstances of the offense and the history and characteristics of the defendant"; the need for the sentence to achieve retribution, deterrence, incapacitation, and, for non-prison sentences, rehabilitation; and the "kinds of sentence[s] and the sentencing range established" by the Sentencing Commission, as well as the Commission's policy statements. 18 U.S.C. 3553(a)(1), (2), (4), and (5). A sentencing court is also required to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. 3553(a)(6). And a sentencing court is required to recognize that "imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. 3582(a). Neither the advisory use of the Guidelines, nor the other limitations on judicial discretion described above, would run afoul of *Blakely*.

2. It is true that "the major premise of the sentencing guidelines" was "the need to avoid unwarranted sentencing disparity," Senate Report 78; see *id.* at 52, and that Congress

included Section 3553(b), making the Guidelines mandatory, because it concluded that voluntary guidelines had a "poor record" of "reducing sentencing disparities" in the States that had experimented with them, *id.* at 79; see *Mistretta*, 488 U.S. at 367. But a court performing severability analysis cannot simply seek to achieve Congress's ultimate purposes regardless of how much judicial lawmaking is required. Rather, the question is whether the severed statute would "operate in a *manner* consistent with the intent" of Congress. *Alaska Airlines*, 480 U.S. at 685. As discussed above, the "manner" in which the Guidelines would operate if subjected to the requirements of *Blakely* would not be in accordance with the intent of Congress.

Introducing jury factfinding for Guidelines enhancements, moreover, could actually produce unwarranted disparities. Quite apart from the variation in results that could be expected from different juries across the country, a jury verdict in favor of a defendant would be immune from appeal by the government, even if grossly out of line with the facts. *Martin Linen Supply Co.*, *supra*. And a jury verdict in favor of the government would presumably be subject to review only under the deferential standard of *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). In rejecting a double-jeopardy attack on government appeals from sentences, this Court noted that the authority for such appeals "should lead to a greater degree of consistency in sentencing." *United States* v. *DiFrancesco*, 449 U.S. 117, 143 (1980). That added consistency would be lost in a considerable number of cases if the Guidelines were made subject to a judicially created requirement that juries must find sentence-enhancing facts.

3. If the Court were to hold that the Guidelines remain binding and applicable subject to a *Blakely*-required overlay of jury factfinding on facts leading to sentence enhancements, defendants in cases like these could receive a sentencing windfall. A holding that the Guidelines remained binding but that enhancing facts had to be charged in an

indictment and found by the jury would leave the sentencing court unable to take into account all relevant factors at sentencing. For example, regardless of the sentences that are appropriate for their particular crimes and regardless of the life imprisonment and 40-year maximum sentences that Congress established by statute for their respective offenses, Booker could be sentenced to no more than 262 months of imprisonment and Fanfan could be sentenced to no more than 78 months of imprisonment. See pp. 10-11, *supra*. That result cannot be squared with Congress's or the Commission's intent. But if the Court were to hold that *Blakely* applies to the Guidelines and then hold that the constitutional flaw in the Guidelines invalidates the system as a whole in a case such as this, then the district court on remand would impose the sentence, within statutory limits, that is appropriate to the defendant's crime in light of the defined purposes of sentencing and the need to avoid unwarranted disparities, treating the Guidelines as advisory.

CONCLUSION

The Court should hold that *Blakely* does not apply to the Federal Sentencing Guidelines. If the Court concludes that *Blakely* does apply, it should hold that the Guidelines as a whole are inapplicable to respondents' cases, and should remand for the district courts to exercise sentencing discretion within the congressional minimum and maximum terms, treating the Guidelines as advisory.

Respectfully submitted.

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SEPTEMBER 2004

Supreme Court, U.S.
FILED
SEP 2 1 2004
OFFICE OF THE CLERK

No. 04-104

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

FREDDIE J. BOOKER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. THE DISTRICT JUDGE VIOLATED THE FIFTH AND SIXTH AMENDMENTS BY FINDING FACTS BY A PREPONDERANCE OF THE EVIDENCE, BY NOT SUBMITTING THOSE FACTS TO A JURY, AND BY IMPOSING A LONGER SENTENCE THAN THE FEDERAL SENTENCING GUIDELINES AUTHORIZED WITHOUT THOSE FINDINGS 4

A. When The Maximum Sentence Authorized By Law Depends Upon The Existence Of A Fact, The Fifth And Sixth Amendments Require The Fact To Be Proven To A Jury Beyond A Reasonable Doubt Or Admitted By The Defendant 6

B. There Is No Principled Distinction Between The Unconstitutional Judicial Fact-Finding In *Blakely* And The Judicial Fact-Finding That Increased Respondent's Sentence 13

C. No Contrary Result Is Compelled By Any Of This Court's Precedents 23

D. The District Court Exceeded Its Constitutional Authority By Imposing Additional Punishment Upon The Respondent On The Basis Of Facts It Found By A Preponderance Of The Evidence At Sentencing 26

TABLE OF CONTENTS – Continued

	Page
1. Relevant conduct	26
2. Obstructing justice	27
II. THE SENTENCING GUIDELINES SURVIVE AND APPLY, BUT THE JURY'S FACTUAL FINDINGS LIMIT RESPONDENT'S GUIDELINE RANGE	28
A. *Blakely* Does Not Invalidate The Sentencing Reform Act Or The United States Sentencing Guidelines As A Whole	28
B. While Courts And Congress May Adopt Jury Trial Procedures For Sentencing Facts In Future Cases, No Jury May Be Convened To Try Sentencing Facts In Respondent's Case	44
CONCLUSION	50

TABLE OF AUTHORITIES

CASES	Page
Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607 (1944)	41, 42
Alaska Airlines, Inc. v. Brock, 480 U.S. 679 (1987)	36, 43
Apprendi v. New Jersey, 530 U.S. 466 (2000)	*passim*
Blakely v. Washington, 124 S.Ct. 2531 (2004)	*passim*
Buckley v. Valeo, 424 U.S. 1 (1976)	37
Burks v. United States, 437 U.S. 1 (1978)	48
Callan v. Wilson, 127 U.S. 540 (1888)	29
Duncan v. Louisiana, 391 U.S. 145 (1968)	29, 46
Edwards v. United States, 523 U.S. 511 (1998)	24, 25
Federal Reserve System Board of Governors v. Dimension Financial Corp., 474 U.S. 361 (1986)	40
Griffith v. Kentucky, 479 U.S. 314 (1987)	30
In re Metzger, 46 U.S. (5 How.) 176 (1847)	33
In re United States, 194 U.S. 194 (1904)	33
Jones v. United States, 526 U.S. 227 (1999)	*passim*
K Mart Corp. v. Cartier, Inc., 486 U.S. 281 (1988)	40
Koon v. United States, 518 U.S. 81 (1996)	18, 19
Lopez v. United States, 373 U.S. 427 (1963)	31
Miller v. Florida, 482 U.S. 423 (1987)	19
Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999)	41

TABLE OF AUTHORITIES – Continued

Page

Mistretta v. United States, 488 U.S. 361 (1989) .....*passim*

North Carolina v. Pearce, 395 U.S. 711 (1969), *overruled in part on other grounds, Alabama v. Smith*, 490 U.S. 794 (1989) 49

Payne v. Tennessee, 501 U.S. 808 (1991) 23

Railroad Ret. Bd. v. Alton R.R., 295 U.S. 330 (1935)..... 36

Regan v. Time, Inc., 468 U.S. 641 (1984)..... 43

Ring v. Arizona, 536 U.S. 584 (2002).....7, 12, 21, 22, 29

Rogers v. Tennessee, 532 U.S. 451 (2001) 19

Stinson v. United States, 508 U.S. 36 (1993)..... 18

Teague v. Lane, 489 U.S. 288 (1989)..... 30

Todd v. United States, 158 U.S. 278 (1895)..... 33

United States v. Ameline, 376 F.3d 967 (9th Cir. 2004) 24, 32

United States v. Bell, 991 F.2d 1445 (8th Cir. 1993)..... 19

United States v. Booker, 375 F.3d 508 (7th Cir. 2004) 15, 24, 32, 48

United States v. Clark, 25 F. Cas. 441 (C.C.D. Mass. 1813) (No. 14,804)..... 33

United States v. DiFrancesco, 449 U.S. 117 (1980) 49, 50

United States v. Dunnigan, 507 U.S. 87 (1993)..... 23, 24

United States v. Grayson, 438 U.S. 41 (1978)..... 23

United States v. Hammoud, 2004 WL 2005622 (4th Cir. Sept. 8, 2004)..... 11

United States v. Jackson, 390 U.S. 570 (1968)..... 47, 48

TABLE OF AUTHORITIES – Continued

Page

United States v. Johns, 2004 WL 2053275 (Pa. 2004) 29

United States v. King, 2004 WL 1769148 (Fla. 2004)..... 35

United States v. Koch, 2004 WL 1899930 (6th Cir. Aug. 26, 2004)..... 15

United States v. Noble, 367 F.3d 681 (7th Cir. 2004)..... 49

United States v. Pineiro, 377 F.3d 464 (5th Cir. 2004) 10

United States v. Price, 361 U.S. 304 (1960)..... 37

United States v. R.L.C., 503 U.S. 291 (1992)..... 19

United States v. Watts, 519 U.S. 148 (1997) (*per curiam*) 24, 27

Williams v. New York, 337 U.S. 241 (1949)..... 25

Williams v. United States, 503 U.S. 193 (1992)..... 31

Witte v. United States, 515 U.S. 389 (1995)..... 23, 24

CONSTITUTION

U.S. Const. amend. V 18, 21, 48

U.S. Const. amend. VI.....*passim*

U.S. Const. art. I, § 7, cl. 2 38

STATUTES AND RULES

5 U.S.C. § 553 38

18 U.S.C. § 3553 32

18 U.S.C. § 3553(a)..... 35, 36

18 U.S.C. § 3553(b).....*passim*

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. § 3553(b)(1) 32
18 U.S.C. § 3593(c) 31
18 U.S.C. § 3742 32
18 U.S.C. § 3742(a)(4) 35
18 U.S.C. § 3742(e) 5, 32
18 U.S.C. § 3742(e)(3) 18
18 U.S.C. § 3742(f)(1) 31
18 U.S.C. § 5037(c)(1)(B) 19
21 U.S.C. § 841(b)(1)(A) 5
28 U.S.C. §§ 991-998 33
28 U.S.C. § 991(b)(1)(B) 28
28 U.S.C. § 994(a)(1) 31, 33
28 U.S.C. § 994(a)(2) 31
28 U.S.C. § 994(k) 26
28 U.S.C. § 994(p) 12, 16
28 U.S.C. § 994(x) 38
Act of Oct. 30, 1995, Pub. L. No. 104-38, § 1, 109 Stat. 334 ..... 17, 37
Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. 108-21, 117 Stat. 649 ..... 1, 17, 18, 19, 20
Sentencing Reform Act of 1984, Pub. L. 98-473, Tit. II, ch. II, 98 Stat. 1987 (Oct. 12, 1984) 28
Sentencing Reform Act, § 217(a), 98 Stat. 1987 28
Wash. Rev. Code § 9.94A.535 11

TABLE OF AUTHORITIES – Continued

Page

Wash. Rev. Code § 9.94A.535(2) 11
Fed. R. Crim. P. 32 32
Fed. R. Crim. P. 32(i)(3)(B) 32
Fed. R. Crim. P. 35(b) 34
Fed. R. Evid. 1101(d)(3) 32

PUBLICATIONS

U.S. Sentencing Guidelines Manual
§ 1B1.1 ..... 4, 5
§ 1B1.2 4
§ 1B1.3 ..... 4, 24, 26
§ 2B1.1 46
§ 2D1.1 ..... 4, 5, 46
§ 3C1.1 ..... 5, 27, 31
§ 3E1.1 ..... 17, 23
§ 4A1.1 5
§ 5A 5
§ 5G1.1 5
§ 5K2.0 ..... 5, 17
§ 6A1.3 ..... 31, 32, 37, 42, 43
U.S. Sentencing Guidelines Manual § 1A1.1, comment., ed. note (reprinting ch. 1, pt. A4(a) in effect Nov. 1, 1987) (2003 ed.) 26, 28
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TABLE OF AUTHORITIES – Continued

Page

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Page

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SUMMARY OF ARGUMENT

1. This Court's recent precedent consistently requires any fact (other than prior conviction) necessary for the imposition of a sentence to be found by a jury beyond a reasonable doubt or admitted in the defendant's plea. The Court attaches no significance to how the fact is labeled, but looks instead to the relationship of the fact to the proposed sentence. If the fact is necessary to a sentence – whether or not labeled as an element – a defendant has the right to have the government prove the fact to a jury.

By asking whether a fact has the effect of increasing the potential sentence to which a defendant is exposed, the rule secures the constitutional rights to jury trial and proof beyond a reasonable doubt. This "bright-line" rule honors the role a jury plays as the democratic institution that authorizes the punishment a court imposes.

This rule applies to facts that increase sentencing ranges under the Federal Sentencing Guidelines. It does not matter that most of the sentence-enhancing facts under the Guidelines were designated by the Sentencing Commission rather than Congress, because Congress cannot delegate the authority to create rules that it cannot constitutionally create itself. Neither the Commission's status as an independent agency nor its location in the Judicial Branch render the rule inapplicable to federal sentencing. Congress retains direct control of the Guidelines and of the Commission, and has assured that judges will not comprise a majority of the Commissioners.

Moreover, petitioner's characterization of the binding sentencing rules that the Commission creates as mere guidance for the exercise of sentencing discretion is inaccurate. For the purpose of constitutional analysis, no principled distinction can be drawn between sentencing rules enacted by Congress and those enacted by the

Commission. None of this Court's precedents render inapplicable the defendant's entitlement to jury findings of all facts that authorize the sentence imposed.

Eight years were added to respondent's punishment for crimes that were never considered by his jury. By making findings of facts that were necessary to the increased sentence, the sentencing judge violated rights secured to respondent by the Fifth and Sixth Amendments.

2. Depriving a defendant of the right to have a jury find facts necessary to a sentence is unconstitutional, but this does not invalidate the entire Sentencing Reform Act or the Sentencing Guidelines promulgated pursuant to it. The federal Guidelines remain operative so long as the fact-finder is a jury rather than a judge.

The Sentencing Commission's preference for judicial fact-finding in the operation of the Guidelines does not assist petitioner, because severability analysis must focus on legislative intent, not on the agency's intent. Like other agencies, the Commission is well positioned to modify its rules to give effect to congressional intent and to respond to changing circumstances, including court holdings that invalidate portions of a regulatory scheme.

Congress enacted sentencing reform to assure that sentences were imposed uniformly and to promote certainty and proportionality in sentencing. A change in the identity of the fact-finder from judge to jury does not disturb these goals. Congress still would have preferred determinate sentencing under guidelines to discretionary sentencing, even had it understood that defendants may insist on jury findings of facts required for an increase in a sentencing range.

Petitioner's argument that the Court should declare the federal sentencing scheme not "severable" is deeply flawed. Petitioner actually urges severability in two ways.

First, it wants the Guideline scheme to apply when no fact-finding is required, but not otherwise. This position effectively severs 18 U.S.C. § 3553(b), which directs courts to apply the Guidelines in every case, from the balance of the federal sentencing scheme. The result is a dual sentencing scheme, one discretionary and the other controlled by guidelines. That result does not further the desire of Congress to promote sentencing uniformity.

Second, petitioner argues that the Guidelines should be advisory – a position that severs the statutory subsection making the Guidelines mandatory from the subsection that permits judges to consider the Guidelines along with other factors in imposing a sentence. Since mandatory Guidelines do not violate the Constitution, petitioner would nullify a constitutional statute in order to create an advisory system that Congress did not want.

Petitioner has not overcome the presumption that favors the retention of legislation. The Guidelines can continue to operate if juries substitute for judges as fact-finders in those cases that are not resolved with a guilty plea. However, the lower court's suggestion that a sentencing jury may be empanelled on remand should be rejected. While a sentencing scheme that permits juries to find Guideline facts can be implemented with or without the assistance of Congress, the Court should not allow that after the trial jury has rendered a verdict and been discharged. To interpret existing sentencing legislation to permit a second jury to find facts after a prosecution has been tried to a verdict would raise grave double jeopardy concerns that are best avoided.

ARGUMENT

I. THE DISTRICT JUDGE VIOLATED THE FIFTH AND SIXTH AMENDMENTS BY FINDING FACTS BY A PREPONDERANCE OF THE EVIDENCE, BY NOT SUBMITTING THOSE FACTS TO A JURY, AND BY IMPOSING A LONGER SENTENCE THAN THE FEDERAL SENTENCING GUIDELINES AUTHORIZED WITHOUT THOSE FINDINGS

Respondent was charged with two drug crimes, both occurring on February 26, 2003. The government proved the first crime – distribution of an unspecified quantity of cocaine base – through the testimony of a witness who said he had purchased an eighth ounce of the drug from respondent minutes before both men were arrested. The government proved the second crime – possession with the intent to distribute more than 50 grams of cocaine base – by presenting evidence that about 92 grams of cocaine base were found in respondent's satchel. (PSR ¶¶ 4-12) Respondent was not charged with other crimes, and the jury was not asked to decide whether respondent distributed drugs at any time prior to February 26, 2003.

Following the guilty verdict on each count, the district judge used the United States Sentencing Guidelines Manual to determine the respondent's sentence. *See* 18 U.S.C. § 3553(b). The Manual first instructs a judge to determine the base offense level applicable to the crime or crimes of conviction. U.S. Sentencing Guidelines Manual § 1B1.1(a), (b); § 1B1.2 (hereinafter Guidelines). The base offense level for the crime of possession with intent to sell 50 to 150 grams of cocaine base is 32. Guidelines § 2D1.1(c)(4). However, the Manual states that the base offense level should include all acts "that were part of the same course of conduct or common scheme or plan as the offense of conviction." *Id.* § 1B1.3(a)(2). The district judge found that

respondent distributed an additional 567 grams of cocaine base during the weeks prior to his arrest. That judicial finding increased respondent's base offense level to 36. *Id.* § 2D1.1(c)(2).

The judge next consulted chapter three of the Manual to decide whether other facts existed that required the offense level to be adjusted up or down. *See id.* § 1B1.1(c), (e). The judge found that respondent obstructed justice by giving false testimony during his trial. Based on that finding, the judge added two points to respondent's offense level, raising it to 38. *See id.* § 3C1.1. After using chapter four to calculate a criminal history category of VI, *see id.* §§ 1B1.1(f), 4A1.1, the judge examined the grid in chapter five to locate the intersection of the adjusted offense level and respondent's criminal history category. *Id.* § 1B1.1(g). The designated sentencing range for an adjusted offense level of 38 and a criminal history category of VI is 360 months to life.[1] *Id.* § 5A.

Had the judge not included an extra 567 grams of cocaine base in the offense level, and had this level not been adjusted upward for an obstruction of justice, the designated sentencing range would have been 240 to 262 months.[2] *Id.* § 5A. Respondent was sentenced to 360 months in prison -- more than eight years longer than the

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[1] The sentencing range ordinarily defines the judge's sentencing authority. *See* 18 U.S.C. § 3553(b). Judges must follow the guidelines "in typical cases (those that lie in the 'heartland' of the crime as the statute defines it)," *Apprendi v. New Jersey*, 530 U.S. 466, 560 (2000) (Breyer, J., dissenting), while downward departures, which are meant to be rarely granted, U.S. Sentencing Guidelines Manual § 5K2.0, p.s., comment. (n.3), are subject to *de novo* appellate review. 18 U.S.C. § 3742(e).

[2] The minimum sentence authorized by the guideline range increased from 210 months to 240 months because respondent's prior felony drug conviction subjected him to a 20 year mandatory minimum sentence. *See* 21 U.S.C. § 841(b)(1)(A); Guidelines § 5G1.1(c)(2).

maximum sentence that the Guidelines authorized on the basis of the facts found by the jury alone.

The court imposed extra punishment upon respondent for crimes and acts that were never charged, never submitted to a jury, and never proven beyond a reasonable doubt. "As a matter of simple justice," procedural safeguards designed to protect the accused should apply equally to each of his acts that the law "has singled out for punishment." *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000). Although the government charged respondent only with selling a small quantity of cocaine base and with possessing another 92 grams on the same day, it wanted him to suffer added punishment for other drug crimes committed at other times and in other places. The court imposed still more punishment because it believed respondent committed perjury during his trial. The court imposed this punishment without affording respondent the procedural protections our Constitution provides against the wrongful infliction of punishment: indictment, proof beyond a reasonable doubt, and trial by jury. The sentencing procedure used in this case violated respondent's constitutional rights because the judge inflicted "punishment that the jury's verdict alone does not allow." *Blakely v. Washington*, 124 S.Ct. 2531, 2537 (2004).

A. When The Maximum Sentence Authorized By Law Depends Upon The Existence Of A Fact, The Fifth And Sixth Amendments Require The Fact To Be Proven To A Jury Beyond A Reasonable Doubt Or Admitted By The Defendant

In *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999), the Court stated with clarity the rule of constitutional law that resolves the first question presented: "[U]nder the Due Process Clause of the Fifth Amendment

and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Jones* construed a federal carjacking statute to avoid the grave constitutional questions that would have arisen if the statute had allowed judges to find facts that authorize a longer sentence. *Jones*, 526 U.S. at 239. Reviewing "a series of cases over the past quarter century," *id.* at 240, the Court identified a question identical in principle to the one in this case: "[M]ay judicial factfinding by a preponderance support the application of a provision that increases the potential severity of the penalty for a variant of a given crime?" *Id.* at 242. The constitutional rule articulated above permits only one answer: Judges may not find facts by a preponderance of the evidence if those facts increase the severity of the punishment to which a defendant is exposed.

Jones asked whether "an unlimited legislative power to authorize determinations setting ultimate sentencing limits without a jury would invite erosion of the jury's function to a point against which a line must necessarily be drawn." *Id.* at 244. The Court drew that line in *Apprendi*, 530 U.S. at 491-92, when it held that the Due Process Clause prohibited a state court judge from deciding a fact that increased a maximum sentence. The legislature's designation of the fact as a "sentence aggravator" rather than an "offense element" provided no principled basis for diluting constitutional safeguards. *Id.* at 476. The constitutional focus must be on "effect," not "form." *Id.* at 494. The Court reinforced that focus in *Ring v. Arizona*, 536 U.S. 584, 602 (2002): "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt."

These rules give effect to the central function the Framers intended a jury to perform in deciding the facts that trigger a judge's authority to impose a sentence.[3] *See Apprendi,* 530 U.S. at 476-83 (examining history); *id.* at 502-18 (Thomas, J., concurring) (same); *Jones,* 526 U.S. at 244-48 (same). No distinction between an "element" and a legislatively prescribed "sentencing factor" was imagined at the time our nation was founded. *Apprendi,* 530 U.S. at 478. The Framers had no reason to depart from the common law understanding that an indictment must allege "every fact essential to the punishment sought to be inflicted," 1 J. Bishop, *Commentaries on Criminal Law* § 961, at 564-65 (5th ed. 1872), and the correlative understanding that "[t]he idea of a jury trial" includes proof of "any particular fact which the law makes essential to the punishment." 1 J. Bishop, *Law of Criminal Procedure* § 87, at 55 (2d ed. 1872).

Petitioner suggests that *Apprendi* requires facts to be decided by a jury only if they increase a sentence "beyond the otherwise-applicable statutory maximum, such that it was the functional equivalent of a different, aggravated offense." Pet. Br. at 15. While petitioner seizes upon the Court's reference to facts that increase the penalty for a crime "beyond the prescribed statutory maximum," 530 U.S. at 490, the *Apprendi* Court's analysis did not turn on whether a sentence-enhancing fact was defined by statute

[3] Alexander Hamilton observed that both the Federalists and the Anti-Federalists "if they agree on nothing else, concur at least in the value they set upon the trial by jury." *The Federalist* No. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* Rachel Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing,* 152 U. Pa. L. Rev. 33, 55-59 (2003) (describing the Framers' belief that the jury was more than a fact-finding body; it was a critical check on the government and its laws mandating punishment).

or on whether it created the equivalent of an aggravated offense. Rather, the Court focused on the role a jury must play in finding any fact required for the imposition of a chosen punishment. The *Apprendi* decision endorsed the *Jones* rule as it had been expressed in a concurring opinion: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." 526 U.S. at 252-53 (Stevens, J., concurring); *quoted and adopted in Apprendi,* 530 U.S. at 490. Accordingly, a defendant may not be exposed "to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Apprendi,* 530 U.S. at 483 (emphasis in original).

The applicability of *Apprendi* to the finding of facts that determine sentencing ranges below a formal statutory maximum was established last Term in *Blakely v. Washington,* 124 S.Ct. 2531 (2004). Although a Washington statute set a formal maximum sentence of ten years for second-degree kidnapping (the crime Blakely admitted in his guilty plea), Washington's Sentencing Reform Act confined the sentencing court's discretion by setting a "standard range" of 49 to 53 months. The court could not exceed this range without finding facts beyond those Blakely admitted in his plea. 124 S.Ct. at 2535. The judge exceeded his authority by finding that Blakely acted with "deliberate cruelty," a fact that was necessary to the 90 month sentence that the judge imposed. *Id.* at 2537.

While ten years was defined by statute as the outer boundary of any sentence for second-degree kidnapping, the Sixth Amendment gave the defendant a right to a jury trial on all facts necessary to the imposition of a sentence in excess of the "standard range." *See Blakely,* 124 S.Ct. at 2538 ("The 'maximum sentence' is no more 10 years here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime) or

death in *Ring* (because that is what the judge could have imposed upon finding an aggravator)"). The maximum sentence to which the *Apprendi* rule refers is the maximum a judge "may impose without any additional findings." *Blakely*, 124 S.Ct. at 2537. It is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Id.* (emphasis in original). The maximum sentence that could be imposed on Blakely was 53 months, not 10 years, because this was the maximum sentence permitted by the facts Blakely admitted in his guilty plea.

Petitioner recharacterizes *Blakely* by relying, not on the language quoted above, but on the analysis of the Fifth Circuit in *United States v. Pineiro*, 377 F.3d 464 (5th Cir. 2004), and on the dissent in the court below. In petitioner's view, Washington law creates an offense of kidnapping and two aggravated versions of that offense: one requiring proof that a weapon was involved, the other requiring proof of deliberate cruelty. Pet. Br. at 18-19. This, petitioner says, is similar to the sentencing statutes at issue in *Apprendi* but unlike the federal Guidelines.[4]

There is in fact no distinction. Washington's sentencing scheme, like the federal Guidelines, permits the judge to find a variety of facts that increase the "standard range"

[4] Commentators appear to be in unanimous agreement that no principled distinction can be drawn between the judicial fact-finding that violated the Constitution in Washington's sentencing scheme and judicial fact-finding that triggers enhanced sentences under the federal Guidelines. *See* Albert W. Alschuler, *To Sever or Not to Sever: Why Blakely Requires Action By Congress*, 17 Fed. Sent. Rep. ___, *4 (forthcoming October 2004), *available for download at* http://sentencing.typepad.com/sentencing_law_and_policy/2004/08/professor_alsch.html ("No academic commentator appears to have given any credence to any asserted distinction"); Stephanos Bibas, Blakely's *Federal Aftermath*, 16 Fed. Sent. Rep. 333, 334 (2004) ("No commentator who has considered this issue agrees with the Department of Justice's position").

sentence to which the defendant is otherwise subject. *See, e.g.*, Wash. Rev. Code § 9.94A.535(2) (listing fourteen aggravating circumstances that permit an increase in the standard range sentence). The Washington scheme differs meaningfully from the federal Guidelines only by affording Washington judges discretion not to exceed the standard range after finding that aggravating facts exist. *Compare* Wash. Rev. Code § 9.94A.535 ("court may impose a sentence outside the standard sentence range") *with* 18 U.S.C. § 3553(b) ("court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4)" unless circumstances exist that were not adequately considered by the Sentencing Commission). Thus, the Guidelines pose an even greater threat to the jury trial guaranty because they *require* judges to impose longer sentences on the basis of judicial fact-finding.

Petitioner's argument that the jury trial right should extend only to facts designated by statute as essential to punishment is inconsistent not only with the Court's analysis in *Blakely*, but with the broad language used in the opinion. *Blakely* does not hinge upon "whether or not the 'statutory maximum' for '*Apprendi* purposes' is actually embodied in a statute." *United States v. Hammoud*, 2004 WL 2005622, *39 (4th Cir. Sept. 8, 2004) (Motz, J., dissenting); *see, e.g.*, *Blakely*, 124 S.Ct. at 2538 ("[b]ecause the State's *sentencing procedure* did not comply with the Sixth Amendment, petitioner's sentence is invalid") (emphasis added); *id.* at 2540 (describing how a sentencing "system" runs afoul of the Sixth Amendment).

With studied understatement, petitioner acknowledges that *Blakely* "could be read to suggest a broader rule." Pet. Br. at 19. So it could. *Blakely*'s definition of the term "statutory maximum" is flatly inconsistent with the one that drives petitioner's analysis.

Petitioner argues, however, that the Court's focus upon the maximum sentence a judge may impose without finding additional facts was unnecessary to its holding. Pet. Br. at 19. The Court's recognition that judges obtain their sentencing authority from the facts found by a jury or admitted in a plea was in fact central to its analysis. Petitioner's vision of *Blakely* gives no effect to the primacy of the jury as the entity that must authorize the punishment to be imposed. Its interpretation of *Blakely* would allow legislatures to structure sentencing laws to deprive a defendant of the right to require proof to a jury of the factual basis for punishment.[5] Its interpretation also fails to give "intelligible content to the right of jury trial," *Blakely*, 124 S.Ct. at 2538, by protecting an accused's entitlement to a jury finding of every fact legally necessary to the punishment imposed. *Id.* at 2537.

The unifying theme of *Jones*, *Apprendi*, *Ring*, and *Blakely* is respect for the Framers' belief that the core protections of notice, jury trial, and proof beyond a reasonable doubt ensure that the facts upon which a punishment is based are determined accurately and consistently with the norms of the community. The Framers scarcely could have envisioned a sentencing scheme that allows a judge (assisted by a probation officer) to find that a defendant committed additional crimes and to impose additional punishment that would not have been authorized in the

[5] It cannot be that the State of Washington could circumvent the Sixth Amendment by creating its own sentencing commission and directing the commission to promulgate the exact sentencing scheme that the Court found unconstitutional in *Blakely*. That would be the roadmap for states to follow, however, if the Court decides that *Blakely* applies to guidelines promulgated by statute but not to guidelines that are promulgated by commissions that are promulgated by statute, and then approved (if only passively) by the legislature. *See* 28 U.S.C. § 994(p).

absence of that finding. The Framers would not have tolerated "exclusively judicial factfinding to peg penalty limits." *Jones*, 526 U.S. at 244.

Respondent's federal Guideline range of 240 to 262 months applicable to his offenses of conviction, like the range of 47 to 53 months in *Blakely*, defined the limits of the court's sentencing authority. No jury decided that respondent committed drug crimes prior to February 26, 2003. No jury decided that respondent obstructed justice during his trial. Because "[t]he judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury," *Apprendi*, 530 U.S. at 482 n. 10, the district court violated respondent's right to a jury trial and to proof beyond a reasonable doubt by finding the facts necessary to the imposition of an additional eight years in prison.

B. There Is No Principled Distinction Between The Unconstitutional Judicial Fact-Finding In *Blakely* And The Judicial Fact-Finding That Increased Respondent's Sentence

Petitioner claims that because the Sentencing Guidelines were authored by a commission instead of a legislature, the rationale of *Blakely* does not apply.[6] But it is the effect that facts have upon a judge's sentencing authority that determines whether a fact must be found by a jury.

[6] Petitioner seemed less certain of that position when it spoke to the Court in *Blakely*. In its amicus brief, petitioner questioned whether the differences between Washington's sentencing scheme and the federal Guidelines were "of constitutional magnitude" given the Commission's accountability to Congress, its delegated authority, the nature of the Guidelines as "binding legislative rules," and the direct enactment of guidelines by Congress. Brief for the United States as Amicus Curiae Supporting Respondent at 29-30, *Blakely v. Washington*, 124 S.Ct. 2531 (2004).

Apprendi, 530 U.S. at 494. The source of the law that links punishment to the existence of a fact makes no difference to the operation of the Sixth Amendment.

Petitioner builds its argument that the Guidelines differ significantly from statutes on a flawed premise: that the Sentencing Commission is a unique, independent, quasi-judicial body that promulgates rules to guide the discretion of judges but does not legislate statutory maxima. Neither the location of the Sentencing Commission in the Judicial Branch nor the nature of its rule-making excuse federal sentencing from the tenet that facts essential to the punishment imposed must be determined by a jury. As importantly, petitioner all but overlooks Congress's role in directly amending the guidelines, in passively ratifying all guideline amendments, and in structuring the Sentencing Commission to assure that judges remain a minority (and to allow their removal from the Commission altogether).

1. Writing for the court below, Judge Posner offered a forceful refutation of petitioner's argument that judges have the authority to find facts essential to the determination of the maximum sentences established by the Sentencing Commission:

> Provisions of the guidelines establish a "standard range" for possessing with intent to distribute at least 50 grams of cocaine base, and other provisions of the guidelines establish aggravating factors that if found by the judge jack up the range. The pattern is the same as that in the Washington statute, and it is hard to believe that the fact that the guidelines are promulgated by the U.S. Sentencing Commission rather than by a legislature can make a difference. The Commission is exercising power delegated to it by Congress, and if a legislature cannot evade what the Supreme Court deems the commands of the Constitution by a multistage sentencing scheme neither, it seems plain, can a regulatory agency.

United States v. Booker, 375 F.3d 508, 510-11 (7th Cir. 2004). It should be obvious that Congress may not assign to the Sentencing Commission the power to do something it could not constitutionally do itself.[7] *See United States v. Koch*, 2004 WL 1899930, *9 (6th Cir. Aug. 26, 2004) (Martin, J., dissenting) (criticizing majority for undermining *Blakely* "by allowing Congress to accomplish indirectly – by delegating authority to the Commission – precisely what we now know the Sixth Amendment prohibits it from doing directly."). As one commentator observed, "to allow Congress to delegate to an agency the power to create a sentencing system that would violate the right to jury trial if Congress enacted this system itself would be bizarre." Albert W. Alschuler, *To Sever or Not to Sever: Why Blakely Requires Action By Congress*, 17 Fed. Sent. Rptr. ___, *4 (forthcoming October 2004), *available for download at* http://sentencing.typepad.com/sentencing_law_and_policy/2004/08/professor_alsch.html. The simple, pointed logic underlying these analyses compels the conclusion that *Blakely* applies to federal sentencing.

2. There is no doubt that the Sentencing Commission is unique, *see Mistretta v. United States*, 488 U.S. 361, 384 (1989) ("the unique composition and responsibilities of the Sentencing Commission give rise to serious concerns about a disruption of the appropriate balance of governmental power among the coordinate Branches"); *id.* ("The

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[7] Justice Breyer asked the obverse question in *Apprendi*, 530 U.S. at 561-62 (Breyer, J., dissenting): "That is, if the Constitution permits a delegate (the commission) to exercise sentencing-related rulemaking power, how can it deny the delegator (the legislature) what is, in effect, the same rulemaking power?" It is precisely because the Sentencing Commission exercises "the same rulemaking power" as Congress when it links maximum sentences to the existence of certain facts that the Sixth Amendment requires those facts to be proved to a jury.

Sentencing Commission unquestionably is a peculiar institution within the framework of our Government."), but its unusual nature does not change its identity as a delegate of congressional authority. While Congress empowered the Commission with "substantial discretion in formulating guidelines," *id.* at 377, the Sentencing Reform Act "'explains what the Commission should do and how it should do it,'" *id.* at 379, *quoting United States v. Chambless*, 680 F. Supp. 793, 796 (E.D. La. 1988), by legislating the general principles that the Commission must follow when deciding how particular "offense and offender characteristics" should bear upon "a full hierarchy of punishment" that ranges "from near maximum imprisonment, to substantial imprisonment, to some imprisonment, to alternatives." *Id.* at 377. The Commission is not a separate and independent branch of government; it is a child of Congress created to do the bidding of Congress. Until recently, the Justice Department seemed to share that understanding of the Commission's role. *See* Dep. Att'y Gen. Larry Thompson, Testimony Before U.S. Sentencing Commission (March 19, 2002), *available at* http://www.ussc.gov/hearings/031902.htm ("In our constitutional system, we believe the Sentencing Commission exists to effectuate the express will of Congress").

Congress delegated to the Commission the authority to make rules that govern federal sentencing, but the Commission remains "fully accountable to Congress." *Mistretta*, 488 U.S. at 393. Congress retained the power to accept, reject, or modify the Guidelines. *See id.* at 383-94; *Blakely*, 124 S.Ct. at 2549 (O'Connor, J., dissenting) ("Congress has unfettered control to reject or accept any particular guideline"); 28 U.S.C. § 994(p). If the Commission desires to amend the Guidelines or to modify amendments that have not taken effect, it must explain its reasoning to Congress, and Congress has at least 180 days to alter or veto the proposed change, 28 U.S.C. § 994(p), although it may do so "at any time." *Mistretta*, 488 U.S. at 394.

Congress has repeatedly exercised its power to shape the Guidelines and dictate their content. It has directed the Sentencing Commission to amend the Guidelines more than fifty times since 1987. *See* U.S. Sentencing Guidelines Manual, Appx. C (2003 ed.) (amendments 134, 135, 141, 156, 203, 317, 363, 364, 370, 435-37, 511, 513-15, 521, 526, 527, 531, 537, 538, 541-44, 551, 554-56, 558, 562, 571, 576, 587, 590, 592, 593, 596, 605, 608-12, 615-17, 637, 647, 648, 650, 651, 653, 654, 659). It disapproved proposed guidelines that would have reduced the disparity between sentences for powdered cocaine and crack cocaine. Act of Oct. 30, 1995, Pub. L. No. 104-38, § 1, 109 Stat. 334. It also disapproved proposed guidelines that would have reduced sentences for money laundering. *Id.*

In addition, Congress has itself legislated Guideline provisions. Section 401(m)(2) of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. 108-21, 117 Stat. 649 (the "PROTECT Act"), directed the Sentencing Commission to promulgate "amendments to the sentencing guidelines, policy statements, and official commentary to ensure that the incidence of downward departures are substantially reduced." In section 401(b), moreover, Congress directly amended the Guidelines by adding a new section to a policy statement (Guidelines § 5K2.0(b)) that limits a court's authority to depart downward when imposing a sentence for certain crimes against children. In subsection 401(i), Congress amended various guidelines and application notes pertaining to crimes against children. Finally, section 401(g) amended the guideline governing acceptance of responsibility (Guidelines § 3E1.1) to permit an additional downward departure of one level (albeit only at the government's request) to reward the prompt entry of a guilty plea. Contrary to petitioner's conception of the process of promulgating guidelines, none of these amendments fairly reflect the collective judgment of the judiciary.

In light of the control that Congress exercises over guideline development, it is of no constitutional consequence that *most* of the guideline provisions are of administrative rather than legislative origin. If a maximum sentence determined by a guideline range that Congress enacted directly is subject to the procedural protections of the Fifth and Sixth Amendments (which it must be, for it is indistinguishable from the standard range in *Blakely*), a maximum sentence enacted administratively, but tacitly approved by Congress, must be subject to the same protection.

3. The dissenters in *Jones* acknowledged that the federal Sentencing Guidelines were only "a more detailed version" of statutes like the one at issue in that case. *Jones*, 526 U.S. at 267-68 (Kennedy, J., dissenting). The PROTECT Act exemplifies the degree to which Congress' control of the Guidelines renders them indistinguishable in principle and effect from Acts of Congress. Like sentencing statutes, the guidelines are binding on courts. *See Stinson v. United States*, 508 U.S. 36, 42-43 (1993) (Guidelines Manual, including policy statements and commentary, binds federal courts); *Mistretta*, 488 U.S. at 391 (the Commission uses its administrative power to create "court rules" that "bind judges and courts in the exercise of their uncontested responsibility to pass sentence in criminal cases"). Judges are directed by statute to follow them. 18 U.S.C. § 3553(b). The term "Guidelines" is therefore a misnomer. Judges are not merely guided; their discretion is fettered by the force of law. A judge who cannot justify a departure from the Guidelines to the satisfaction of an appellate court will be reversed.[6] 18 U.S.C. § 3742(e)(3).

[6] The amicus brief filed by the Ad Hoc Group of Former Federal Judges disregards the actual operation of the Guidelines and instead describes them as it would like them to be. While the brief cites *Koon v. United States*, 518 U.S. 81 (1996), for its understanding that it "was not the congressional purpose to withdraw all sentencing discretion from

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This Court recognized in *United States v. R.L.C.*, 503 U.S. 291 (1992), that the federal Sentencing Guidelines create a binding maximum sentence that has the same force as a maximum created by statute. In deciding that the Juvenile Delinquency Act, which limits detention to "the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult," 18 U.S.C. § 5037(c)(1)(B), referred to the maximum term of imprisonment established by the Guidelines rather than the formal statutory maximum, the Court rejected "any suggestion that the statutory character of a specific penalty provision gives it primacy over administrative sentencing guidelines" because, the Court understood, "the mandate to apply the Guidelines is itself statutory." 503 U.S. at 297. The Court's understanding in *R.L.C.* that a maximum sentence authorized by the Guidelines has the same limiting force as a maximum sentence enacted by statute undermines the distinction between guidelines and statutes upon which petitioner rests its argument.

If there were any doubt about the legal force and effect of the Guidelines, it has been settled many times by decisions applying the *Ex Post Facto* Clause to the Guidelines amendments. *See, e.g., United States v. Bell*, 991 F.2d 1445, 1447 & n.4 (8th Cir. 1993), and cases cited; *see also Miller v. Florida*, 482 U.S. 423 (1987) (retroactive application of Florida's sentencing guidelines violated *Ex Post Facto* Clause). As petitioner concedes, Pet. Br. at 25, the *Ex Post Facto* Clause limits legislative power, not judicial decisionmaking. *Rogers v. Tennessee*, 532 U.S. 451, 456 (2001). The *Ex Post Facto* Clause applies to the Guidelines

the United States District Judge," 518 U.S. at 113, the PROTECT Act undermined that understanding by requiring the Commission to effect a substantial reduction in downward departures, by reducing the grounds for departure, and by substituting *de novo* appellate review for the abuse of discretion standard adopted in *Koon*.

because, just as a legislature does, the Commission creates legally enforceable rights.

Thus, the administrative origin of maximum sentences established by the Guidelines does not distinguish them from maximum sentences established legislatively. As Justice O'Connor noted, the Guidelines "have the force of law," and their promulgation by an administrative agency "is irrelevant to the majority's reasoning" in *Blakely*. 124 S.Ct. at 2549 (O'Connor, J., dissenting).

4. Neither is the Commission's "nominal" placement in the Judicial Branch relevant to *Blakely*'s reasoning. *See id.*, 124 S.Ct. at 2549 (O'Connor, J., dissenting). "Although placed by the [Sentencing Reform] Act in the Judicial Branch, it is not a court and does not exercise judicial power." *Mistretta*, 488 U.S. at 384-85. Nor is the Commission "controlled by or accountable to members of the Judicial Branch." *Id.* at 393. Judges may be appointed to the Commission, but Congress recently amended the law to assure that judges would comprise a minority ("no more than three") of the Commission members. The appointment of judges to the Commission is no longer required.[9] PROTECT Act, *supra*, § 401n. It is fanciful to characterize the work of the Commission as "judges guiding judges" when judges necessarily are a minority and need not sit on the Commission at all.

The Commission exercises political, not adjudicative, power. The authority that Commissioners wield "is not judicial power; it is administrative power derived from the enabling legislation." *Mistretta*, 488 U.S. at 404. When the Commissioners do their work, they do not work as judges. *Id.*. The Commission's work is of a "significantly political nature," *id.* at 393, and the Commission exercises "political judgment" to carry out its responsibilities. *Id.* at 395. It

[9] At the time *Mistretta* was decided, at least three of the seven voting members were required to be judges. 488 U.S. at 368.

is precisely because the Commission was not granted adjudicatory functions that its authority to craft sentencing rules does not violate the constitutional principle of separation of powers. *Id.* at 388-90. Because the Commission's work is functionally legislative rather than adjudicative, its location in the Judicial Branch cannot insulate the rules it creates from the demands of the Fifth and Sixth Amendments.

5. Juries are the embodiment of democracy in the courts. *See Blakely*, 124 S.Ct. at 2539; John Adams, Diary Notes on the Right of Juries (Feb. 12, 1771) *in* 1 Legal Papers of John Adams 228, 229 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965) (the Constitution requires the "Common People" to act as "an absolute Check" upon the legislature); Thomas Jefferson, Letter to Abbé Arnoux, July 19, 1789, in 15 The Papers of Thomas Jefferson 282, 283 (Julian P. Boyd ed., 1958) ("Were I called upon to decide whether the people had best be omitted in the legislative or judiciary department, I should say it is better to leave them out of the Legislative."). Juries provide a counterweight to executive and judicial abuse and bestow democratic approval (or disapproval) upon the government's action by finding (or declining to find) the facts that authorize punishment. *See* Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33, 54-59 (2003) (reviewing evidence that Framers expected jury to represent the community's sense of justice when government seeks to condemn or punish behavior as blameworthy). The need to preserve that role animated the decisions in *Apprendi*, *Ring*, and *Blakely*. Neither the source of the authorizing law (Congress or its delegate), the label attached to it (statute or administrative rule), nor the branch of government in which it was promulgated can make a principled difference in the operation of the constitutional imperative that all facts legally necessary to the punishment imposed must be found by a jury.

The Framers could not have envisioned a Sentencing Commission,[10] but if the idea had been proposed, it is impossible to believe that they would have given Congress the power to deprive a defendant of the right to have a jury find the facts that are necessary for punishment simply by delegating the authority to link facts and punishment to a commission that it establishes and controls. It would not have mattered to the Framers whether maxima were created by Congress or its delegate. What would have mattered is ensuring that the facts triggering the judge's authority to impose a particular sentence are found by a jury. That "bright-line rule," *Blakely*, 124 S.Ct. at 2540, secures the role of the jury envisioned by the Framers.

6. Just as the decision in *Ring* was compelled by a need to implement the holding of *Apprendi* "in a principled way," *Ring*, 536 U.S. at 613 (Kennedy, J., concurring), the decision in *Blakely* requires sentences authorized by the federal Guidelines to be grounded in facts found by a jury or admitted in a plea. Petitioner concedes as much by acknowledging that if *Blakely* means what it says, the

[10] It is thus disingenuous for petitioner to fault the Court for pointing to "no historical authorities" that considered sentencing schemes similar to the federal Sentencing Guidelines. Pet. Br. at 39-40. As the Court observed in *Apprendi*, 530 U.S. at 479, sentencing schemes with which the Framers were familiar did not include narrowly defined sentencing ranges that were triggered by the judicial finding of one or more facts in addition to those that defined some underlying crime. The Court has considered at length the role that juries have historically played as the finders of those facts that are necessary to the punishment sought and imposed. *Blakely*, 124 S.Ct. at 2539; *Apprendi*, 530 U.S. at 476-83; *id.* at 502-18 (Thomas, J., concurring); *Jones*, 526 U.S. at 244-48. Petitioner offers no historical analysis of its own, and the Court's view of history is entirely consistent with that of recent commentators. *See, e.g.*, Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings About* Apprendi, 82 N.C.L. Rev. 621, 629-41 (2004); Barkow, *supra*, at 48-65.

Guidelines set maximum sentences that depend upon facts admitted in a plea or found by a jury. Pet. Br. at 39.

The Court should reject petitioner's invitation to overrule *Blakely* just months after its announcement. *Stare decisis* "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Petitioner's dissatisfaction with *Blakely* provides no cause to reconsider a decision so recently written.

C. No Contrary Result Is Compelled By Any Of This Court's Precedents

1. No case decided by this Court prior to *Apprendi* is "fundamentally at odds" with the view that *Blakely* applies to federal sentencing, as petitioner contends. Pet. Br. at 33. Relying on a pre-Guidelines holding that a judge may consider a defendant's trial perjury when selecting a discretionary sentence, *United States v. Grayson*, 438 U.S. 41 (1978), the Court in *United States v. Dunnigan*, 507 U.S. 87 (1993), rejected an argument that enhancing a defendant's sentence pursuant to Guidelines § 3C1.1 for committing perjury at trial undermined the defendant's right to testify.[11] In *Witte v. United States*, 515 U.S. 389 (1995), the Court rejected a claim that an indictment violated the Double Jeopardy Clause when the facts underlying the charged offense had produced an increase in the defendant's Guideline sentence. *See* Guidelines

[11] *Dunnigan* viewed "the risk of incorrect findings of perjury by district courts" as "inherent in a system which insists on the value of testimony under oath." 507 U.S. at 97. When the law links a fact to increased punishment, however, the risk of error in finding that fact should be minimized by constitutional protections against the erroneous infliction of punishment.

§ 1B1.3 (relevant conduct). Neither *Dunnigan* nor *Witte* addressed the Sixth Amendment. Enforcing the Sixth Amendment's mandate for jury fact-finding does not contravene the logic or the holding of either case.

United States v. Watts, 519 U.S. 148 (1997) (*per curiam*), and *Edwards v. United States*, 523 U.S. 511 (1998), presented questions of Guidelines interpretation. *Watts* construed relevant conduct under § 1B1.3 to include acquitted conduct.[12] *Edwards* held that it did not matter whether the jury found the defendant guilty of conspiring to possess cocaine or cocaine base because all of the defendant's relevant conduct would be considered at sentencing. Neither case decided whether the relevant conduct fact-finder should be a judge or a jury.

Petitioner attempts to elevate *Edwards* to the status of a Sixth Amendment holding by arguing that Edwards relied upon the Sixth Amendment's jury-trial guarantee to bolster his contention that the sentencing court should have assumed the jury found him guilty only of conspiring to possess cocaine. Pet. Br. at 36. But "Edwards did not argue that the Guidelines sentencing scheme violated his Sixth Amendment right to a jury trial; indeed, Edwards presumed that had the jury identified whether cocaine or cocaine base was the object of the conspiracy, the district court could have properly determined the quantity of the identified drug at sentencing consistent with the Sixth Amendment." *United States v. Ameline*, 376 F.3d 967, 978 (9th Cir. 2004). *Accord Booker*, 375 F.3d at 514 ("The Court . . . did not rebuff a Sixth Amendment challenge to the guidelines because there was no Sixth Amendment challenge to the guidelines."). In any event, the Court flatly

[12] The Court suggested that the Court of Appeals' holding to the contrary might have been based on the view of double jeopardy that the Court rejected in *Witte*. *Watts*, 519 U.S. at 154.

stated "we need not, and we do not, consider the merits of petitioners' statutory and constitutional claims." 523 U.S. at 516. The Court should be taken at its word.

Edwards did not become a constitutional holding by virtue of a footnote in *Apprendi*, as petitioner suggests. Pet. Br. at 37-38. Responding to a dissenting observation that the logic of *Apprendi* applied to the federal Guidelines, the footnote "express[ed] no view on the subject beyond what this Court has already held." 530 U.S. at 497 n.21. By way of example, the Court cited *Edwards*' reference to a constitutional claim that might have arisen if Edwards had been sentenced to more than the statutory maximum for a cocaine-only conspiracy. *Id.* The *Apprendi* footnote did not mutate a decision that expressly declined to consider a constitutional claim and that never mentioned the Sixth Amendment into a decision of controlling constitutional precedent.

2. Petitioner relies heavily on *Williams v. New York*, 337 U.S. 241 (1949), a case that decided whether a New York court violated the defendant's right to due process by considering information at sentencing that it learned of after the trial. Although it viewed the question as "serious and difficult," *id.* at 244, the Court decided that the "prevalent modern philosophy" of individualized punishment made it necessary for a sentencing judge to consider a full range of information. *Id.* at 247. The Court noted that indeterminate sentences had "to a large extent taken the place of the old rigidly fixed punishments" and that rehabilitation had replaced retribution as the dominant goal of criminal justice. *Id.* at 248. In the context of these "progressive efforts to improve the administration of criminal justice," the Court was careful not to hinder the judge's ability to exercise discretion wisely. *Id.* at 251.

Changing philosophies of punishment have rendered the reasoning of *Williams* "almost wholly inapplicable to

guidelines sentencing in federal court."[13] Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. Cal. L. Rev. 289, 318 (1992). *Blakely* underscored that point by rejecting the argument that the constitutionality of judicial fact-finding in a discretionary sentencing scheme implies the constitutionality of judicial fact-finding in a scheme that ties facts to specified sentencing ranges. 124 S.Ct. at 2540. A judge's authority to consider facts that shape a discretionary sentence has no bearing on the defendant's right to a particular sentence – "and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned." *Id.*

D. The District Court Exceeded Its Constitutional Authority By Imposing Additional Punishment Upon The Respondent On The Basis Of Facts It Found By A Preponderance Of The Evidence At Sentencing

1. Relevant conduct

Sentencing in federal court is designed to punish the "real offense" the defendant committed. U.S. Sentencing Guidelines Manual § 1A1.1, comment., ed. note (reprinting ch. 1, pt. A4(a) in effect Nov. 1, 1987) (2003 ed.). The Guidelines accomplish that objective in large part by basing punishment on "relevant conduct" pursuant to Guidelines § 1B1.3. That provision requires punishment to reflect "the entire range of conduct, regardless of the number of counts that are alleged or on which a conviction is obtained." § 1B1.3 comment, backg'd.

[13] Federal sentencing eschews rehabilitation as a legitimate goal of imprisonment. 28 U.S.C. § 994(k).

In *Watts*, this Court explained that "sentencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed his crime." *Id.* at 154. Respondent was convicted of two discrete crimes that occurred on February 26, 2003. His relevant conduct (as found by the judge at sentencing) included acts of drug distribution that occurred on earlier days in different places. His relevant conduct did not reflect "the manner in which he committed his crime"; it reflected other crimes. By imposing extra punishment for additional crimes that were never submitted to a jury – punishment that was only authorized under the Guidelines by a finding that the crimes occurred – the district judge violated respondent's Sixth Amendment right to have a jury decide the facts that were essential to his punishment.

2. Obstructing justice

The sentencing judge increased respondent's offense level (and thus the maximum available sentence) after finding that respondent obstructed justice by lying during his trial testimony. Guidelines § 3C1.1. The threat of punishment for false testimony has historically invoked the right to a jury trial. *Blakely* expressly addressed that point: "Why perjury during trial should be grounds for a judicial sentence enhancement on the underlying offense, rather than an entirely separate offense to be found by a jury beyond a reasonable doubt (as it has been for centuries, see 4 William Blackstone, Commentaries 136-138 (1769)), is unclear." 124 S.Ct. at 2539-40 n.11.

Seeking punishment at sentencing for perjury that was never charged or proved beyond a reasonable doubt to the satisfaction of a jury may have been more convenient

for the government than commencing a second criminal prosecution, but it was an affront to the Constitution. Because the verdict did not authorize the additional punishment imposed upon respondent, the Seventh Circuit's decision to vacate respondent's sentence must be affirmed.

II. THE SENTENCING GUIDELINES SURVIVE AND APPLY, BUT THE JURY'S FACTUAL FINDINGS LIMIT RESPONDENT'S GUIDELINE RANGE

A. *Blakely* Does Not Invalidate The Sentencing Reform Act Or The United States Sentencing Guidelines As A Whole

The Sixth Amendment principles that this Court has explicated since *Jones* and *Apprendi*, and that it applied in *Blakely* to a guideline sentencing scheme, apply first in federal cases. But *Blakely* and the jury trial guaranty neither require nor preclude any particular theory of penology or system of sentencing. The Court's words in *Blakely* serve here as well. "This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment." *Blakely*, 124 S. Ct. at 2540. Both determinate sentencing and systems in which guidelines channel sentencing discretion are compatible with *Blakely*.

1. Because the Sixth Amendment operates before sentencing to determine a sentence's limits, not at sentencing or in its imposition, *Blakely* and the Seventh Circuit's decision below leave intact the primary purposes of the Sentencing Reform Act of 1984, Pub. L. 98-473, Tit. II, ch. II, 98 Stat. 1987 (Oct. 12, 1984). Those purposes include certainty, uniformity, proportionality and fairness. *See id.*, § 217(a), 98 Stat. 1987, 2018 (in part enacting 28 U.S.C. § 991(b)(1)(B)); U.S. Sentencing Guidelines Manual § 1A1.1 Commentary.

Blakely and the decision below address the scope of the Sixth Amendment's jury trial guaranty, not the merits of Congress' sentencing goals. A court's power to sentence rests on a finding of guilt, which ordinarily is the jury's province if the defendant elects a trial. *Callan v. Wilson*, 127 U.S. 540, 556-57 (1888); *Duncan v. Louisiana*, 391 U.S. 145, 151-57 (1968). The jury's finding determines the maximum sentence that the defendant may receive. *Blakely*, 124 S. Ct. at 2537; *Ring*, 536 U.S. at 602.

In federal court specifically, the Sentencing Guidelines may continue to govern sentencing. *See United States v. Johns*, 2004 WL 2053275, *6 (M.D. Pa. 2004) ("Once this maximum is established [by the jury], the court may employ the Guidelines as they were intended . . . ") *Blakely* and the Sixth Amendment govern the predicates of sentencing, but not the scheme for imposing sentence once the predicates are determined. If an increased sentence hinges on facts that have not been admitted in a plea, the jury must find them on proof beyond a reasonable doubt. Sentencing then goes forward.

Within that limit, *Blakely* and the Sixth Amendment do not speak to whether the judge decides a term of imprisonment absolutely (determinate sentencing); decides that term provisionally, subject to later reduction by the executive (indeterminate sentencing); or merely imposes a sentence selected by the legislature (mandatory sentencing).[14] Likewise, the Sixth Amendment and *Blakely*

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[14] Some judges have described the result of declaring the Sentencing Guidelines non-severable as "indeterminate sentencing". That is a misnomer. Indeterminate sentencing refers to schemes in which a judge imposes a term of imprisonment with an upper limit, subject to discretionary release at an earlier time by an executive authority (usually a parole board). Black's Law Dictionary 911 (rev. 4th ed. 1968).

Sentencing without the guidelines, as some district judges are practicing it after *Blakely*, is not indeterminate sentencing. It is

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do not dictate how legislatures and courts should assure proportionality, uniformity, certainty, fairness, or other sentencing goals. Legislators have room to select a penological theory they favor within the limits of the Sixth Amendment.

2. Judges no longer may decide what facts are probable and increase the guideline range on the basis of those decisions. Some defendants who (prior to *Blakely*) waived jury trial without admitting facts that support upward adjustments under the Sentencing Guidelines, or who had jury trials that failed to determine those facts, will receive lower sentences than they would have received before *Blakely*. Cases straddling *Blakely* are short-term phenomena. Prosecutors and courts adapted rapidly to the *Blakely* decision. *See* Dep. Att'y Gen. James Comey, Memorandum to all Federal Prosecutors (July 2, 2004), *reprinted in* 16 Fed. Sent. Rep. 357 (2004). And in some cases the unfairness that the petitioner perceives in shorter sentences is mitigated by the government's ability to charge defendants with the additional crimes that cannot be considered as relevant conduct at sentencing.

Still, some defendants – those whose convictions were not final at the time *Blakely* was decided – may, as petitioner fears, escape significant Guideline enhancements as a result of *Blakely*'s application to federal sentencing. This result is unavoidable because the holding of *Blakely* applies to cases pending in trial courts and on direct review. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987); *Teague v. Lane*, 489 U.S. 288 (1989). The price is worth paying when compared to the alternative of sacrificing these defendants' constitutional rights. Petitioner's concern that a limited number of straddle defendants may

discretionary but determinate sentencing unless the perceived invalidity of the Sentencing Reform Act resurrects parole.

receive a windfall[15] is of little relevance to the Court's constitutional or severability analysis.

To the extent that this guideline system will have asymmetrical burdens of proof on aggravating and mitigating factors, *see* Pet. Br. at 50, that is not novel either in legislative schemes, *cf.* 18 U.S.C. § 3593(c) (in capital cases, government must prove aggravating factors beyond reasonable doubt; defendant must prove mitigating factors by a preponderance of the information), or in judicial schemes. *See, e.g., Lopez v. United States*, 373 U.S. 427, 433 n.4, 434-35 (1963) (defendant must make "some showing" of government inducement to raise entrapment defense; quoting approvingly trial court's instruction calling that burden a preponderance).

3. Because the Sixth Amendment affects only amenability to sentencing and the outer limits of punishment, *Blakely* calls into doubt on their face very few provisions of the Sentencing Guidelines and the Sentencing Reform Act.

a. Applied to the Guidelines, *Blakely* seems to invalidate outright only one procedural policy statement,[16] Guidelines § 6A1.3, and perhaps parts of one rule of criminal procedure. All else it affects only indirectly, by application.[17]

[15] In cases like respondent's, there is no "windfall." Pet. Br. at 68. If a sentence of almost 22 years for a man in his 50's, rather than a 30 year sentence, conforms to petitioner's concept of a windfall, that concept is not likely to be widely shared.

[16] This Court has distinguished between "guidelines" and "policy statements," *Williams v. United States*, 503 U.S. 193, 200 (1992), just as the Sentencing Reform Act does. *See* 28 U.S.C. §§ 994(a)(1), (a)(2). Federal courts must follow both. *Williams*, 503 U.S. at 200-01, discussing 18 U.S.C. § 3742(f)(1).

[17] The only guideline petitioner identifies as lost after *Blakely* is § 3C1.1, applicable to an obstruction of justice. It is true that an enhancement could not be imposed for an obstruction (like perjury) occurring during or after trial, but an enhancement for pre-indictment obstruction remains available, provided it is proved to a jury.

Guidelines § 6A1.3(a) directs "the court" to resolve any dispute over factors important to the sentencing determination, using information reliable enough to support its "probable accuracy." Subsection (b) provides that "[t]he court" shall resolve those disputed sentencing factors at a sentencing hearing under Fed. R. Crim. P. 32. For that reason, *Blakely* and the lower court's decision in *Booker* may invalidate Fed. R. Crim. P. 32(i)(3)(B) (requiring "the court" to resolve disputed portions of the presentence report at sentencing if the dispute will affect the sentence).[18]

b. *Blakely's* direct effect on the Sentencing Reform Act itself extends only to parts of two subsections of the Act: § 212(a)(2), which created 18 U.S.C. § 3553 and other provisions; and § 213(a), which created 18 U.S.C. § 3742. Section 3553(b)(1) requires the imposition of a sentence within the applicable guideline range unless "the court" finds aggravating or mitigating circumstances not adequately considered by the Sentencing Commission. Section 3742(e) provides for appellate review of the district court's findings of fact. Severing the term "court" as fact-finder in these statutes does not assault Congress's basic intentions. *Accord United States v. Ameline*, 376 F.3d 967, 980-83 (9th Cir. 2004).

Indeed, the specific identity of the fact-finder does not appear prominently anywhere in the Sentencing Reform Act. Had Congress been concerned centrally with the difference between judge and jury as fact-finder, § 3742(e) – addressing appellate review of "the findings of fact of the district court" after sentencing – would have been an

[18] Because a jury trial invokes the Federal Rules of Evidence, *Blakely* and *Booker* also may affect the word "sentencing" in Fed. R. Evid. 1101(d)(3), which provides that the rules are inapplicable at sentencing. They do not abrogate it, however, as *Blakely* does not affect a judge's ability to find facts at sentencing that do not determine the guideline range.

unlikely place to express that concern, as if an afterthought. Taken in whole, the Act suggests that Congress was less concerned with the identity of the predicate fact-finder than with certainty, uniformity and proportionality.

Petitioner suggests that *Blakely* also directly impairs § 217(a) of the Sentencing Reform Act, which created 28 U.S.C. §§ 991-998, and therefore § 994(a)(1). Pet. Br. at 47. But *Blakely* does not affect the statute's assignment of guidelines for "use of a sentencing court."[19] 28 U.S.C. § 994(a)(1). Sentencing courts may continue to apply the Guidelines. When and how the sentencing court applies which guidelines will depend on predicate jury findings, just as a jury verdict traditionally has set the limits of the sentence that a judge may impose. The use of Guidelines by a "sentencing court" leaves room to accommodate the jury's constitutional role.

4. If Congress intended judges and not juries to decide facts that increase a guideline range beyond that

[19] Petitioner's contention that 28 U.S.C. § 994(a)(1) is invalid if *Blakely* applies to federal sentencing turns on the premise that "court" means "judge" and thus excludes a jury. *See* Pet. Br. at 47-48. It does not. Federal courts long have distinguished between courts, as inanimate institutions, and judges, as human officers who work in those institutions. *See, e.g., In re Metzger,* 46 U.S. (5 How.) 176, 191 (1847). As Justice Story explained while riding circuit, "A court is not a judge, nor a judge a court. A judge is a public officer who, by virtue of his office, is clothed with judicial authorities. A court is defined to be a place in which justice is judicially administered." *United States v. Clark,* 25 F. Cas. 441, 442 (C.C.D. Mass. 1813) (No. 14,804) (Story, Circuit Justice).

Sometimes the distinction between judge and court is important, *Todd v. United States,* 158 U.S. 278, 282-84 (1895) (witness intimidation indictment dismissed, where testimony was at a preliminary examination before a commissioner who was not a "court of the United States"); *Clark,* 25 F. Cas. at 442-43 (perjury indictment dismissed on same grounds), and sometimes not. *In re United States,* 194 U.S. 194, 196-97 (1904). But the term "court" at least allows a construction that makes room for a jury's role as well as a judge's.

authorized by the verdict, the Court must decide whether the balance of the Sentencing Reform Act, or the Guidelines promulgated pursuant to it, can stand. Petitioner correctly notes that some lower courts have held that the Guidelines do not apply at all after *Blakely*. Those courts have envisioned a purely discretionary, yet still determinate, sentencing scheme. That vision declares the Guidelines not severable, while apparently leaving in place as severable much of the Act itself – its elimination of parole, its statutory good time formula, supervised release, and its limitation of motions to modify a sentence to the prosecution's use. Fed. R. Crim. P. 35(b).

Petitioner endorses that reasoning. As it urges nonseverability, petitioner relies tacitly on severability at crucial points. The United States apparently would sever a statutory provision that *Blakely* does not invalidate, 18 U.S.C. § 3553(b),[20] to leave a discretionary but determinate scheme that exacerbates the worst qualities of the indeterminate sentencing system that the Sentencing Reform Act replaced: judges on the free range, now without the post-sentencing tool of parole, which prior to the Sentencing Reform Act corralled sentences toward uniformity and proportionality. Petitioner turns severability on its head. It would excise the valid, resurrect the invalid, and so create a new system antithetical to the purposes of the Act.

Worse yet, petitioner proposes that this Court sever federal sentencing into two distinct, and quite different, schemes functioning side by side. For defendants who can

[20] Section 3553(b) directs the court to impose a sentence within the applicable guideline range unless unusual circumstances exist. *Blakely* does not invalidate that directive because *Blakely* is concerned only with how facts necessary to a sentence are found. Once a jury determines the necessary facts, a statutory directive that courts sentence within designated Guideline ranges does not violate the Sixth Amendment.

be sentenced without judicial fact-finding, the Guidelines would continue to apply untouched. If fact-finding is necessary at sentencing, the Guidelines would not apply other than as advisory shadow laws, Pet. Br. at 67, although the Sentencing Reform Act's determinate features would apply. Petitioner nowhere explains why Congress would have intended determinate sentencing without the channeling effect of mandatory guidelines in some cases but not in others.[21]

Neither does petitioner explain how retaining the Guidelines as advisory laws that shape discretion, presumably by preserving 18 U.S.C. § 3553(a) while striking § 3553(b), is consistent with its argument that the Guidelines are not severable. Petitioner's argument is that none of the guidelines survive to bind, but all of them survive to guide.[22] The argument necessarily urges severability as a

[21] The dual scheme that petitioner proposes would be subject to manipulation by both parties. If a party did not want the Guidelines to apply, a mere claim that a sentence-enhancing fact must be found seemingly would assure that the Guidelines are not binding at sentencing. A party who wanted the Guidelines to apply would argue that no additional facts need be found at sentencing. Petitioner's "schizophrenic" application of the Guidelines in some cases but not in others, *United States v. King*, 2004 WL 1769148, *3 (M.D. Fla. 2004), is unworkable for that reason.

[22] Whether that guidance would be enforceable or reviewable on appeal, petitioner does not say. The law provides for "plainly unreasonable" review when "there is no sentencing guideline," 18 U.S.C. § 3742(a)(4), but petitioner does not explain whether that standard, or any other, would apply if a judge did not follow advisory guidelines. Any appellate review of a court's application of an "advisory" guideline would seem to imply that the guideline has binding force. Petitioner's proposed remedy either nullifies appellate review of sentences, which Congress plainly did not intend, or uses appellate review as a back door restoration of binding guidelines, complete with judicial fact-finding, in violation of the Sixth Amendment.

court's only authority to consider the Guidelines comes from § 3553(a).

Strikingly, petitioner does not explain how its dual sentencing schemes would advance, rather than impede, uniformity and proportionality in federal sentencing. Duality cannot advance uniformity. Congress thought in 1984 that federal judges were not singing from the same sheet of music. Petitioner would not only restore, but increase the cacophony.

With its dual sentencing schemes, petitioner tacitly proposes that this Court "rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole." *Railroad Ret. Bd. v. Alton R.R.*, 295 U.S. 330, 362 (1935). That is precisely what petitioner elsewhere agrees a court may not do. Pet. Br. at 45.

For these reasons, the Court should reject petitioner's purely discretionary, yet determinate, proposal for one side of a dual system of federal sentencing. Congress did not intend the Guidelines to be used in some cases but not in others. Congress did not intend judges to impose wholly discretionary sentences in any case. The remedy proposed by petitioner does not advance uniformity, and without the national perspective and leveling influence of the Parole Commission, it does not advance proportionality. Petitioner's proposed remedy less resembles what Congress intended than a surviving guideline system (admittedly dependent on jury findings) that continues to cabin discretion.

5. Because the root question is whether the statute will continue to function in a manner consistent with legislative intent, *Alaska Airlines, Inc. v. Brock*, 480 U.S. 679, 685 (1987), severability presupposes legislation as its object. Legislators express their intentions in legislation, and in the process that produces legislation.

The legislature does not typically write regulations. It leaves that task to the executive branch. Congress therefore does not ordinarily express its intent through regulations.[23] It expresses its intent only by the manner in which it authorizes regulations.

Petitioner's focus on the manner in which the Sentencing Commission intended the Guidelines to work therefore is misplaced. The Guidelines do not reflect legislative intent directly. They reflect the Sentencing Commission's mediate intent in implementing congressional directives. While the Commission's work must be consistent with Congress's, the Commission's intent is one step removed from legislative intent. The Commission's intent also is of little relevance to severability analysis. What is relevant is fidelity to congressional intent, as expressed in the statute.

It therefore makes no difference whether the Sentencing Commission would have promulgated the existing Guidelines if it could not have included Guideline § 6A1.3. As petitioner suggests, the Guidelines are lengthy and detailed. They account for a variety of facts that might be more conveniently determined by a judge than a jury. But Congress did not tell the Sentencing Commission to write lengthy and detailed guidelines that are better suited to judicial fact-finding than to jury fact-finding. It told the

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[23] Although Congress has written sentencing guidelines, *see* discussion of PROTECT Act, *supra* at 17, they reveal little about the intent of the Congress that enacted the Sentencing Reform Act. *See United States v. Price*, 361 U.S. 304, 313 (1960) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one"). Neither do they reveal whether Congress would have enacted the Guidelines knowing that juries rather than judges could not find the facts that determine sentences. *See Buckley v. Valeo*, 424 U.S. 1, 128 (1976) (intent is determined by whether Congress would have enacted the law without the offending provision).

Commission to devise a guideline scheme that would accomplish the goals of uniformity and proportionality.

The question is not whether the Sentencing Commission would have written identical Guidelines if it had known it could not assign the finding of every guideline fact to a judge. The question is whether Congress would have directed the Commission to create a determinate guideline sentencing scheme if it had known that the Constitution requires juries to find facts necessary to increase guideline ranges. That question is easily answered: Congress wanted to end sentencing disparities by reducing judicial discretion, and it likely would have believed the Commission capable of creating such guidelines within the framework of the Constitution.

6. There are other good reasons to bring severability analysis to bear only on the intent of the legislature, rather than on the intent of the body that promulgates regulations or guidelines. In our constitutional system, the legislature is the principal author of broad policy. The legislative branch is the most responsive to public preferences. But the Framers feared that the legislature would breed tyranny (and addressed the legislative branch first as a matter of priority, not accident; *see generally The Federalist* No. 48 (James Madison) (Clinton Rossiter ed., 1961)). They accordingly established a rigid and counterbalanced process of enacting legislation. Both houses of Congress must approve a bill. The president must sign or veto it. U.S. Const. art. I, § 7, cl. 2. Only an enhanced majority in Congress overrides a presidential veto. U.S. Const. art. I, § 7, cl. 2.

Executive branch regulations and judicial branch guidelines under an authorizing statute, by contrast, require a less rigid process. While the Administrative Procedures Act usually requires public notice and opportunity for comment, 5 U.S.C. § 553, and those requirements bind the Sentencing Commission, 28 U.S.C. § 994(x), the regulatory process,

including the Commission's work, remains more fluid than the legislative process.

It must be that way. Congress acts at a moment in time; agencies and the Sentencing Commission implement that legislation over time. Given that task, agencies amend, modify or repeal regulations as shifting demographic, political, economic, technological, or other trends warrant. They repromulgate regulations easily, in most instances.

When a court strikes down a particular regulation, then, it usually has no reason to doubt that the agency can amend or reconsider the troublesome provision and continue apace. With this fluidity of response, only rarely should there be reason to suppose that the loss of a single fruit might imperil the tree, let alone despoil the entire regulatory orchard.

In this regard, the Sentencing Commission and its Guidelines are no different than executive branch agencies and their regulations. The Commission in fact has amended the Guidelines almost annually, sometimes more often, since their inception. In the first 16 years, the amendments added up to hundreds. The Sentencing Commission adopted 662 through November 5, 2003, many with several parts. *See* U.S. Sentencing Guidelines Manual, Appx. C (2003 ed.). The Commission has tinkered as it has seen fit, both in response to congressional directives and on its own. Possessed of that demonstrated capacity to amend and adapt, the Sentencing Commission gives little reason to fear that the loss of any particular guideline or guidelines should threaten the whole.

7. Almost all of this Court's severability precedent addresses legislation. However, this Court on rare occasion has applied severability analysis to regulations or an executive order. Those cases provide few rules for a coherent application of severability doctrine to administrative enactments.

In *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988), this Court struck down a subsection of a Customs Service regulation permitting importation of certain "gray-market" goods, but held that the subsection was "severable."[24] *K Mart*, 486 U.S. at 294. The Court's entire explanation of this ruling was:

> The severance and invalidation of this subsection will not impair the function of the statute as a whole, and there is no indication that the regulation would not have been passed but for its inclusion.

Id. at 294. In its brevity, the *K Mart* Court did not explain why invalidation of one regulation ever would "impair the function" of a statute. Impairment seems unlikely, for an agency faces no bar to promulgating a new regulation that serves the legislative intent and satisfies a court's objection.

The Court also did not explain its inquiry into the likelihood that the agency would have promulgated the rest of the regulation without the offending portion. This is an inquiry into agency intent, while severability turns on legislative intent. A more telling question would be whether Congress would have wanted a regulatory scheme to exist even if the regulation at issue could not be promulgated.

[24] In the only case that *K Mart* cited in applying severability analysis to a regulation, *Federal Reserve System Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361 (1986), the Court struck down the Federal Reserve Board's definition of a "bank" as contrary to the Bank Holding Company Act of 1956. Without addressing severability, the Court apparently left intact other Federal Reserve Board regulations (at least the Court did not say otherwise). *Dimension Financial*, 474 U.S. at 374-75. The Court well may have proceeded on the assumption that a stricken regulation simply becomes inoperative, and that the agency is free to write a replacement consistent with legislative intent.

In *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), the Court tentatively applied severability doctrine to an 1850 executive order of President Zachary Taylor. *Mille Lacs Band*, 526 U.S. at 190-95. The Court declared the executive order not severable. *Id.* at 191. However, *Mille Lacs Band* noted at the outset that, "Although this Court has often considered the severability of *statutes*, we have never addressed whether *Executive Orders* can be severed into valid and invalid parts, and if so, what standard should govern the inquiry." *Id.* (italics in original). The Court also observed that no party challenged the court of appeals' assumption that executive orders are severable and that the standards applicable to statutes also apply to those orders. *Id.* With no challenge to those assumptions, the Court wrote cautiously that, "for purposes of this case we shall assume, *arguendo*, that the severability standard for statutes also applies to Executive Orders." *Id.* The decision offers scant support for the proposition that the Sentencing Commission's intent in crafting the Guidelines has any bearing on whether judicial fact-finding was so essential to congressional intent that Congress would not have enacted sentencing reform without it.

To the extent that these cases offer any help at all, they suggest that federal courts usually will view regulatory schemes as severable. Respondent has discovered no case in which this Court held a regulatory scheme (as distinct from President Taylor's 150-year old executive order) non-severable. But the cases offer little support for petitioner's contention that the Commission's intent in creating a detailed set of interrelated Guidelines has any bearing on what Congress intended in enacting sentencing reform.

Petitioner also cites *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 618-19 (1944), in support of its argument that the Sentencing Commission's policy

judgments are important to a severability analysis. Pet. Br. at 47. That decision undercuts petitioner's point. *Holly Hill Fruit* invalidated one part of one section within a group of regulations under the Fair Labor Standards Act of 1938. Rather than try to save that single section by rewriting it to patch the invalid portion, the Court remanded that job to the Administrator and directed the district court to stay the case pending that regulatory rewrite. *Holly Hill Fruit*, 322 U.S. at 619. The Court nowhere cast doubt on the rest of the sections within that regulatory scheme under the FLSA.

Holly Hill Fruit therefore supports respondent's view that agencies, not courts, write and rewrite regulations; that agencies quickly can correct their mistakes; and that the failure of one regulatory section provides no occasion to apply severability analysis to the whole, or even to consider the possibility that the loss of one provision might invalidate the entire scheme. By analogy here, this Court may refrain from rewriting Guidelines § 6A1.3 to correct the word "court," if that word does not bear a construction that accommodates the jury's role. The Sentencing Commission is capable of responding to this Court's application of *Blakely* to federal sentencing by rewriting Guidelines § 6A1.3 and by amending other guidelines if doing so will better advance the goals of uniformity and proportionality in sentencing. But the loss of Guidelines § 6A1.3 gives no reason to consider discarding all other guidelines.

8. If the focus is on legislative rather than agency intent, the question is not whether the Sentencing Commission would have written the current Guidelines if it had known that facts requiring longer sentences must be found by a jury. The question is whether Congress would have enacted the Sentencing Reform Act with the benefit

of that knowledge. The answer is that *Blakely* does not threaten the demise of the entire Act.[25]

This Court starts with a presumption of severability. *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984). The presumption serves democracy by avoiding the unnecessary invalidation of legislation. *Id.* at 652-53. Here, the presumption underscores the need to save those portions of the law that serve the broad purposes Congress identified.

Changing the fact-finder from judge to jury to comply with *Blakely* does not impede the purposes of the Act. The Sentencing Commission remains. Sentences will be fixed and predictable. Discretionary parole will not reappear. Sentencing will continue generally to operate in the manner Congress intended. *See Alaska Airlines*, 480 U.S. at 685.

Although *Blakely* prevents judges from finding probable facts that require an increased sentence, federal courts retain a determinate sentencing scheme that will preserve the key congressional objectives of certainty, uniformity and proportionality. Fact-finding as a predicate to sentencing may not operate after *Blakely* as Congress intended, but legislative intent always yields to constitutional imperatives. That in itself is not sufficient reason to discard the entire law.

9. Changing the identity of the fact-finder will not cause the Sentencing Reform Act to lose its ability to function independently. In any event, no statute functions "independently" in the sense that petitioner argues. *See*

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[25] Severability analysis leads to the same result whether it focuses on the Act or on the Guidelines. The loss of one policy statement, Guidelines § 6A1.3, and the constitutionally required insertion of a different predicate (a jury finding on a higher standard of proof) for upward adjustments does not undermine the basic sentencing scheme that both Congress and the Commission designed.

Pet. Br. at 59-63. No statute can. Federal law is complex and connected, in the sense that constitutional rights, rules of procedure, and statutes always inform the operation of court proceedings, other statutes, and regulations. No statutory scheme ever functions with complete independence, devoid of impact upon other rules, statutes, and rights. Neither can it avoid their impact.

Like all federal statutes, the Sentencing Reform Act works within a complex matrix of rights, rules, and statutes that makes absolutes few, and requires courts frequently to reconcile competing interests. That truism makes the function of the Sentencing Reform Act no less independent. Where a constitutional requirement, like the right to jury trial, collides with a statute, to some degree the statute yields. But the legislature's enactments are not so inconsequential that they must collapse in the collision.

B. While Courts And Congress May Adopt Jury Trial Procedures For Sentencing Facts In Future Cases, No Jury May Be Convened To Try Sentencing Facts In Respondent's Case

If this Court applies *Blakely* to federal sentencing but leaves in place the Sentencing Reform Act, as respondent urges, the Court will face the question whether federal courts may submit facts to juries that support guideline range increases. They may, in cases not already tried.

This Court and lower courts are capable of fashioning procedures to assure a fair determination of Guideline facts. This Court also might elect to wait for Congress to fashion the best procedures for submitting Guideline facts to juries. Both courses constitutionally are open.

As petitioner notes, choices need to be made when applying *Blakely* to federal sentencing. Congress may wish to make some of those choices. Congress may desire to

address the charging of additional facts in an indictment. Congress may wish to provide statutory authority to empanel a jury to decide sentencing factors after a guilty plea is entered to an underlying charge, or to designate standards for the bifurcated trial of Guideline facts. But the absence of legislation serves as no barrier to compliance with the Constitution. Even without the assistance of Congress, this Court and the lower courts have ample authority to bring federal sentencing practice into compliance with the Sixth Amendment right to jury trial.

1. The forerunner of the modern jury existed before writings of kings or parliaments authorized it. The jury was developing in regions of Europe and Scandinavia, including England, by the twelfth century. R.C. Van Caenegem, The Birth of the English Common Law 71-79 (Cambridge Univ. Press, 2d ed. 1988). The year 1215 marked both the Fourth Lateran Council (which forbade clerical participation in trials by ordeal, and so sped reliance on other forms of trial), Roger D. Groot, *The Early-Thirteenth-Century Criminal Jury*, *in* Twelve Good Men and True: The Criminal Jury Trial in England, 1200-1800, 10 (J.S. Cockburn & Thomas A. Green eds., Princeton 1988), and John's reluctant accession to Magna Carta. But "[t]here was little in Magna Carta that directly affected the development of the jury." Groot, *supra*, at 10. Magna Carta acknowledged the right to a jury, rather than created or defined that fact-finding body. 1 William Blackstone, Commentaries *123-24 (1765) (describing Magna Carta and English liberties: "Which charter contained very few new grants; but, as Sir Edward Coke observes, was for the most part declaratory of the principal grounds of the

fundamental laws of England"). The jury has non-statutory, or common law, roots many centuries old.[26]

2. This Court and the lower federal courts are capable of adapting jury trials to the Sixth Amendment predicates of federal sentencing. Petitioner's pragmatic concerns cannot trump a constitutional right, but those concerns are overstated. Federal courts long have conducted bifurcated trials in criminal cases (on insanity defenses or forfeiture provisions, for example) and in civil cases (on liability and damages). Instructing jurors on the law is what courts always have done, even when the law is complex, as in a patent or securities fraud trial. Federal courts are familiar with special verdicts; they have been employed in criminal cases routinely since *Apprendi*.

The facts that are often most critical to sentencing (and those that result in the most severe offense level increases) include drug quantities (Guidelines § 2D1.1) and financial loss (Guidelines § 2B1.1). Those facts are readily susceptible to jury determination in special verdicts. And proving relevant conduct is little different from proving a separately charged crime.[27] While the Sentencing Guidelines include dozens or hundreds of potential enhancements, in any given case but a few are implicated.

Giving notice of potential sentence enhancements already has proven feasible. The Department of Justice began seeking superseding indictments that include

[26] This Court acknowledged 36 years ago that historians now regard as mistaken the view that the jury trial traces back only to Magna Carta. *Duncan v. Louisiana*, 391 U.S. at 151 n.16 (citing 1 Frederick Pollock & Frederic W. Maitland, *The History of the English Law Before the Time of Edward I* 173 (2d ed. 1909)).

[27] A few guideline enhancements, such as obstruction of justice by perjury at trial, are not capable of charging in advance or submission to the jury. Those are rare exceptions causing little or no harm. Often, the government will have a remedy: it may charge a new offense.

sentencing allegations within days or weeks after this Court's decision in *Blakely*. *See* Comey memorandum, *supra*. They can continue to do so.

Petitioner's fears about complexity ultimately are fears of juries and judges. As to juries, the Framers understood that governments would not always appreciate the jury's role; in part, that was the point of securing the right to jury trial in the Constitution. As to judges, there is no reason to fear an inability to manage complex trials and to instruct upon complex legal rules. They do so regularly.

3. As petitioner correctly notes, this Court has refused to fashion a sentencing jury where the legislature has not provided one. *United States v. Jackson*, 390 U.S. 570 (1968); Pet. Br. 60-61. The *Jackson* Court declined "to extend the capital punishment provision of the Federal Kidnaping Act in a new and uncharted direction, without the compulsion of a legislative mandate and without the benefit of legislative guidance." 390 U.S. at 581.

The Kidnapping Act applied the death penalty only to defendants who lost a trial; the lives of those who pled guilty were automatically spared. The Court deemed this too great a burden on the right to a jury trial. *Id.* at 572. To avoid that consequence, the government asked the Court to instruct lower courts to convene juries after guilty pleas were entered to decide upon death. The Court declined to do so. *Id.* at 580-81.

Jackson applies here to this extent: for those defendants who have entered a guilty plea or against whom a verdict has been rendered, no new and separate sentencing jury can be convened. Empanelling a sentencing jury in a noncapital case after the trial jury has been discharged would be an innovation unknown in federal criminal law; the Court would have to create it "from whole cloth." *Id.* at 580. *Jackson* restrains courts from going that far.

For defendants who have not entered a plea or had a trial, however, no wholly new trial procedure need be invented. Trying Guideline facts with the underlying charges in a single proceeding before a single jury, in whatever fashion best promotes fairness, would require no extraordinary change in procedure, and is not barred by *Jackson*'s logic or language.

4. There is another reason to reject the lower court's suggestion that a sentencing jury might be empanelled for respondent. Interpreting existing sentencing legislation to permit the use of a sentencing jury after trial, and indeed after appeal, would raise a serious constitutional doubt under the Double Jeopardy Clause of the Fifth Amendment.[28] This Court avoids those doubts when it can. *See, e.g., Jones*, 526 U.S. at 239-40.

"The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks v. United States*, 437 U.S. 1, 11 (1978). Respondent understands that his case concluded before the government appreciated what *Blakely* requires to gain guideline offense level increases. "Nonetheless, where the Double Jeopardy Clause is applicable, its sweep is absolute. There are no 'equities' to be balanced, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination." *Burks*, 437 U.S. at 11 n.6.

At least where a defendant does not obtain a new trial on appeal, the Fifth Amendment's Double Jeopardy Clause applies as much to bar a second, higher punishment on additional evidence as to bar a second determination of

[28] The lower court recognized the possibility that the Double Jeopardy Clause might preclude a sentencing jury. *Booker*, 375 F.3d at 514.

guilt or innocence on additional evidence. *See North Carolina v. Pearce*, 395 U.S. 711, 719-21 (1969), *overruled in part on other grounds, Alabama v. Smith*, 490 U.S. 794 (1989); *United States v. Noble*, 367 F.3d 681, 682-83 (7th Cir. 2004) (government may not offer additional evidence of drug quantity on remand, where it failed to carry burden at first sentencing).

Pearce allowed a longer sentence after retrial, rejecting a double jeopardy challenge. That rule "rests ultimately upon the premise that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." *Pearce*, 395 U.S. at 721. The essential premise is missing here. Respondent stands convicted of the offenses with which he was charged.

This Court's decision in *United States v. DiFrancesco*, 449 U.S. 117 (1980), does not countenance additional evidence in a new jury trial to increase respondent's maximum possible sentence on remand. *DiFrancesco* held that the Double Jeopardy Clause permits a higher sentence on remand, where a statute expressly authorizes the government to appeal a sentence. *DiFrancesco*, 449 U.S. at 132-39. But that case arose during the era of indeterminate sentencing. The distinctions between that era and guideline sentencing after *Blakely* make a crucial difference. As *DiFrancesco* noted, the government appeal there did "not involve a retrial or approximate the ordeal of a trial on the basic issue of guilt or innocence." *DiFrancesco*, 449 U.S. at 136. "Furthermore," *DiFrancesco* continued, "a sentence is characteristically determined in large part on the basis of information, such as the presentence report, developed outside the courtroom. It is purely a judicial determination, and much that goes into it is the result of inquiry that is nonadversary in nature." *Id.* at 136-37. None of those justifications for a higher sentence on remand obtain today.

To the contrary, a sentence on remand here that relied on upward adjustments under the Guidelines would require a full-blown jury trial, as adversarial and likely to cause "embarrassment, expense, anxiety, and insecurity" as the first. *Id.* at 136. The cornerstone of *DiFrancesco* – a streamlined resentencing on judicial determinations unaffected by the Sixth Amendment right to jury trial – is not present here. For respondent, the Double Jeopardy Clause would block a sentencing jury trial on remand, or at least raise serious constitutional doubts. The Court should reject the lower court's suggestion that a sentencing jury may be convened after remand.

CONCLUSION

For the reasons stated, this case should be remanded for further proceedings not inconsistent with this Court's opinion.

Respectfully submitted,

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Supreme Court, U.S.
FILED
SEP 27 2004
OFFICE OF THE CLERK

Nos. 04-104 and 04-105

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REPLY BRIEF FOR THE UNITED STATES

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TABLE OF CONTENTS

		Page
I.	*Blakely* does not apply to the United States Sentencing Guidelines	2
	A. A fact that increases the Guidelines offense level does not increase the statutory maximum sentence	3
	B. This Court's decisions recognize the distinction between a fact that increases the statutory maximum sentence and a fact that increases the guidelines offense level	7
	C. If *Blakely* would require that the Guidelines offense level be treated as the statutory maximum sentence, that aspect of *Blakely* should be reconsidered	10
II.	The Guidelines cannot be applied as binding sentencing rules in cases where jury factfinding would be required	10
	A. The current Sentencing Guidelines system rests on a premise of judicial factfinding	12
	B. Requiring jury factfinding under the guidelines would invite—not avoid—serious constitutional doubt	17
	C. Employing the Guidelines as advisory in a limited class of cases is an appropriate remedy	19

TABLE OF AUTHORITIES

Cases:

Apprendi v. *New Jersey*, 530 U.S. 466 (2000)	6, 9, 18
Blakely v. *Washington*, 124 S. Ct. 2531 (2004)	2, 3, 5, 10
Edwards v. *United States*, 523 U.S. 511 (1998)	8
Harris v. *United States*, 536 U.S. 545 (2002)	6, 10
INS v. *Chadha*, 462 U.S. 919 (1983)	5
McKaskle v. *Wiggins*, 465 U.S. 168 (1984)	11

Cases—Continued:

	Page
Mistretta v. *United States*, 488 U.S. 361 (1989)	2, 3, 4, 5, 9, 18, 19
Patterson v. *New York*, 432 U.S. 197 (1977)	14
Regan v. *Time, Inc.*, 468 U.S. 641 (1984)	20
Rogers v. *Tennessee*, 532 U.S. 451 (2001)	16
Sabri v. *United States*, 124 S. Ct. 1941 (2004)	20
Tilton v. *Richardson*, 403 U.S. 672 (1971)	14
United States, In re, 194 U.S. 194 (1904)	11
United States v. *Dunnigan*, 507 U.S. 87 (1993)	4, 8
United States v. *Emmenegger*, 329 F. Supp. 2d 416 (S.D.N.Y. 2004)	4, 8
United States v. *Hammoud*, 2004 WL 2005622 (4th Cir. Sept. 8, 2004)	10
United States v. *Hudson*, 11 U.S. (7 Cranch) 32 (1812)	1, 18
United States v. *Jackson*, 390 U.S. 570 (1968)	15
United States v. *Medas*, 323 F. Supp. 2d 436 (E.D.N.Y. 2004)	15
United States v. *Watts*, 519 U.S. 148 (1997)	8
Witte v. *United States*, 515 U.S. 389 (1995)	4, 8, 13

Constitution, statutes and rules:

U.S. Const.:	
Art. I	15
§ 7, Cl. 2	5
§ 9, Cl. 3 (Ex Post Facto Clause) (federal)	16
§ 10, Cl. 1 (Ex Post Facto Clause) (state)	16
Art. III	18
Amend. V (Double Jeopardy Clause)	7
Amend. VI	1, 2, 3, 4, 6, 7, 15, 16, 19
Federal Judiciary Protection Act of 2002, Pub. L. No. 107-273, § 11009(d), 116 Stat. 1820-1821	7
PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650	5
§ 401(b), 117 Stat. 668-669	5
§ 401(d), 117 Stat. 670-671	5
§ 401(g), 117 Stat. 671-672	5

Statutes and rules—Continued:

	Page
§ 401(m), 117 Stat. 675	5
§ 401(n)(1), 117 Stat. 676	5
Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (18 U.S.C. 3551 *et seq.*):	
18 U.S.C. 3553(a)(2)(A)	16
18 U.S.C. 3553(b)	13
Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796:	
§ 80001(b), 108 Stat. 1986	6
§ 240002, 108 Stat. 2081	7
18 U.S.C. 2113(a)	1, 2
18 U.S.C. 3593(b)	17
18 U.S.C. 3624(b)	12
21 U.S.C. 841(b)	17
28 U.S.C. 991(a)	3, 6
28 U.S.C. 994(a)(1)	11
28 U.S.C. 994(p)	5
Fed. R. Crim. P. 35(b) (1983)	12
United States Sentencing Guidelines:	
§ 1A1.1 editorial note (A)(3)	13
§ 2B3.1	2
§ 3A1.1(b)	2
§ 3E1.1	15
Ch. 5, Pt. A (Sentencing Table)	2
App. C	7

Miscellaneous:

<http://www.ussc.gov/general/commbios99.htm>	6
<http://www.ussc.gov/general/Oldcomms.htm>	6
S. Rep. No. 225, 98th Cong., 1st Sess. (1983)	11
United States Sentencing Comm'n:	
Supplementary Report on the Initial Sentencing Guidelines and Policy Statements (June 18, 1987)	17
2002 Sourcebook of Federal Sentencing Statistics	14

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ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Through this nation's history, Congress has established the penalties for crimes and the elements that trigger those penalties. See *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812). Thus, historically, for a bank robbery offense, the elements were defined by statute, 18 U.S.C. 2113(a), and a judge could have sentenced a defendant to a term of imprisonment up to the 20-year maximum set forth in that sta-

tute, taking into account whatever facts the judge deemed relevant—including whether the defendant may have been responsible for a string of robberies, whether the defendant endangered a child in the bank, or whether the defendant exhibited bad character worthy of longer punishment by lying on the witness stand. The Sixth Amendment had no role in regulating those findings, no matter how critical they were to the sentence imposed.

When Congress directed the Sentencing Commission, a body in the Judicial Branch, *Mistretta* v. *United States*, 488 U.S. 361 (1989), to regularize judicial sentencing practices, it did not change the statutory maximum. But the judge's discretion is now cabined by the Sentencing Guidelines, which require him to consider factors such as whether a firearm was brandished or discharged; whether any victim sustained bodily injury or serious bodily injury; and whether the crime involved a particularly vulnerable victim. Guidelines §§ 2B3.1, 3A1.1(b). The judge then determines a sentence within a range that is usually far below the 20-year statutory maximum. In respondents' view, however, the *real* "statutory maximum" for bank robbery is now 41 months for a first offender (base offense level of 20, criminal history category I, see Guidelines § 2B3.1; *id.* Ch. 5, Pt. A (Sentencing Table)), and the Sixth Amendment now guarantees the defendant a right to jury trial on any fact that raises that 41-month cap. There is nothing in the Sixth Amendment that transforms the statutory maximum from the 20 years set forth in Section 2113(a) of Title 18 of the United States Code to 41 months, or equates the work product of the Commission with the statutes enacted by Congress.

I. *BLAKELY* DOES NOT APPLY TO THE UNITED STATES SENTENCING GUIDELINES

Respondents and their amici acknowledge that *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), and the cases on which it rests, applied a Sixth Amendment rule that determines which of two competing *statutes* defines the "relevant 'statutory maximum'" for a particular crime. *Id.* at 2537. Despite the fact that the Sentencing Guidelines are not statutes—but are instead sentencing rules promulgated by a body in the judicial branch, designed to channel the historic discretion of federal sentencing judges—respondents contend that *Blakely*'s rule should be extended to the Guidelines to avoid elevating form over substance. Fanfan Br. 13; Booker Br. 11. Respondents also contend that, even if the origin of the Guidelines mattered, Congress exerts sufficient control over the Guidelines to invest them with a legislative character. Fanfan Br. 15-18; Booker Br. 20-25. Those propositions are at odds with a central premise of at least four of this Court's decisions describing the interrelationship of the Guidelines and the statutes that define criminal offenses and establish maximum punishments. U.S. Br. 32-38. Respondents' propositions are also inconsistent with a critical premise of the decision upholding the constitutionality of the Sentencing Commission: that the Commission does not "enlist the resources or reputation of the Judicial Branch in * * * the legislative business of determining what conduct should be criminalized," *Mistretta*, 488 U.S. at 407, but instead promulgates rules "for the exercise of the Judicial Branch's own business—that of passing sentence on every criminal defendant," *id.* at 408. Respondents' effort to extend *Blakely* to the Guidelines, with the effect of invalidating that sentencing system, a body of this Court's precedent, and the foundations of *Mistretta*, is unsound and should be rejected.

A. A Fact That Increases The Guidelines Offense Level Does Not Increase The Statutory Maximum Sentence

As the government explained in its opening brief (at 20-32), the Sentencing Guidelines are distinct from statutes that increase a maximum sentence based on the finding of a particular fact. First, as this Court recognized in *Mistretta*, the Sentencing Commission is not a legislature and does not exercise legislative functions; it is "an independent commission in the judicial branch," 28 U.S.C. 991(a), whose functions

are "attendant to a central element" of that branch's "historically acknowledged mission," *Mistretta*, 488 U.S. at 391, of deciding "what sentence" within the range set by Congress "is appropriate to what criminal conduct under what circumstances," *id.* at 395. Second, as Judge Lynch has observed, the Guidelines do not "divide crimes into narrow degrees and standard categories," but instead "provide a methodology for assessing the seriousness of different instances of crime, quite separate from the elements of any particular statutory crime." *United States* v. *Emmenegger*, 329 F. Supp. 2d 416, 435 (S.D.N.Y. 2004). Those features of the Guidelines establish that they are a means of channeling the discretion of sentencing judges to impose a sentence within a legislatively established range—not an exotic and constitutionally problematic administrative system for redefining the "elements" of crimes.

1. Respondents and a number of amici contend (Booker Br. 26; Fanfan Br. 19; FAMM Br. 9; NYCDL Br. 14-15; WLF Br. 3, 7-8) that facts that increase a Guidelines offense level are materially different from sentence-enhancing facts under the pre-Guidelines regime—which all agree could be found by judges without infringing the Sixth Amendment—because facts found under the pre-Guidelines regime did "not pertain to whether the defendant has a legal *right* to a lesser sentence," *Blakely*, 124 S. Ct. at 2540. But rigor and predictability do not somehow transform judicial sentencing rules into statutory maxima. Indeed, in other contexts, this Court has repeatedly rejected the contention that the relative rigor of judicial sentencing under the Guidelines compared to the pre-Guidelines system makes a constitutional difference. See, *e.g.*, *Witte* v. *United States*, 515 U.S. 389, 402 (1995); *United States* v. *Dunnigan*, 507 U.S. 87, 98 (1993).

Congress, in lieu of creating the Commission, could have required district judges to participate in "sentencing councils" in an effort to regularize judicial practices and could have authorized appellate review to ensure that sentences were consistent with the work of the councils, all without

Sixth Amendment difficulty. U.S. Br. 23-24. If, under such a hypothesized system, a court of appeals held, for example, that a first-time offender who acted as a courier in a cocaine distribution conspiracy, carried a small amount of the drug, and had no other involvement in the offense, should not receive a prison term of more than five years, a defendant of that type who received a longer prison term would have "a legal *right* to a lesser sentence," *Blakely*, 124 S. Ct. at 2540, enforceable through appellate review. Such a regime would not violate the Sixth Amendment, however, because it would be the product of judges engaged in their "historically acknowledged mission." *Mistretta*, 488 U.S. at 391. Indeed, one of respondents' amici appears to agree that there could be no Sixth Amendment objection to a system of appellate review that gave rise to "a common law of sentencing." FAMM Br. 28, 30.

2. Echoing the view of Booker and many of respondents' amici, Fanfan contends that Congress has always had "direct influence over the substance of the Guidelines" (Br. 25), and that the PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650, "further consolidated congressional control" over them (Br. 23-24). But the Commission's guidelines, which like judicially-promulgated procedural rules are subject to a delayed effective date after submission to Congress, 28 U.S.C. 994(p), and can be "revoke[d] or amend[ed]" by Congress at any time, *Mistretta*, 488 U.S. at 393-394, do not constitute "laws." The enactment of legislation can be accomplished only through the procedures specified in Article I, Section 7, Clause 2 of the Constitution. *INS* v. *Chadha*, 462 U.S. 919, 944-951 (1983). Congress's "influence" over the Guidelines does not convert them from sentencing rules promulgated by a body in the judicial branch, see *Mistretta*, 488 U.S. at 395, into the equivalent of aggravated crimes (which Congress has never passed into law).

Nor does the PROTECT Act have that effect. The sentencing provisions of that law dealt largely with *downward* adjustments and departures, see Pub. L. No. 108-21,

§ 401(b), (d), (g), and (m), 117 Stat. 668-672, 675, which do not implicate Sixth Amendment concerns, see *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 n.16 (2000); *Harris* v. *United States*, 536 U.S. 545, 565 (2002) (plurality opinion). Contrary to the contention of respondents and a number of their amici (Booker Br. 20; Fanfan Br. 24; FAMM Br. 18; NACDL Br. 16; NYCDL Br. 8 n.3; WLF Br. 5), the PROTECT Act's amendment of 28 U.S.C. 991(a) to provide that "[n]ot more than 3" (instead of "[a]t least 3") members of the Sentencing Commission shall be federal judges, Pub. L. No. 108-21, § 401(n)(1), 117 Stat. 676, does not alter the validity or continuing significance of this Court's conclusion in *Mistretta* that the Commission's function "has been and remains appropriate to the Judicial Branch," 488 U.S. at 396. The *Mistretta* decision suggested that a variety of institutions closely related to the mission of the judicial branch are constitutionally unproblematic even though some were comprised "of nonjudges only." *Id.* at 389. In any event, the Commission now includes three federal judges, the same as when *Mistretta* was decided. Compare http://www.ussc.gov/general/commbios99.htm with http://www.ussc.gov/general/Oldcomms.htm. Accordingly, Fanfan's suggestion that it might someday "include *no* judges whatsoever" (Br. 24) is purely speculative.

The evidence offered by amicus National Association of Criminal Defense Lawyers (NACDL) to support its charge of longstanding and "substantial legislative interference" with the Commission's work (Br. 12) does not accurately reflect either the extent of Congress's direct amendment of the Guidelines or the relevance of its amendments to the issue in these cases. Of the 69 "congressional directives" listed in the appendix to amicus NACDL's brief, a number involved downward adjustments or departures, see, *e.g.*, Pub. L. No. 103-322, § 80001(b), 108 Stat. 1986, and thus do not implicate the Sixth Amendment. Many of the others merely directed the Commission to review particular guidelines and amend them "as appropriate," sometimes offering a

statement of "Congress's sense" of an appropriate revision and sometimes not. See, *e.g.*, Pub. L. No. 107-273, § 11009(d), 116 Stat. 1820-1821. Even when Congress did suggest specific changes, the Commission was not bound by the suggestion.[1] Indeed, of the 662 amendments adopted since the Guidelines went into effect, it appears that only 18 involve base offense levels or upward adjustments specifically mandated by Congress. See Guidelines App. C amends. 134, 135, 141, 203, 363, 364, 370, 436, 521, 537, 538, 543, 544, 555, 576, 608, 649, 650. And none of those amendments is at issue here. Booker's acknowledgment that "*most* of the guideline provisions are of administrative rather than legislative origin" (Br. 18) is thus a considerable understatement.

B. This Court's Decisions Recognize The Distinction Between A Fact That Increases The Statutory Maximum Sentence And A Fact That Increases The Guidelines Offense Level

1. As the government explained in its opening brief (at 32-38), this Court has on four occasions affirmed Guidelines sentences that had been increased on the basis of a fact that the district court found to have been proved by a preponderance of the evidence. Respondents point out (Booker Br. 23-25; Fanfan Br. 25-26) that none of those decisions squarely addressed the question whether, under the Sixth Amendment, a fact that increases a defendant's offense level must be found by the jury based on proof beyond a reasonable doubt. The government explicitly acknowledged as much in its opening brief (at 32). The decisions are nevertheless critically important to the issue in these cases. First, the decisions endorse the proposition that the United States Code, rather than the Guidelines Manual, establishes maxi-

[1] For example, after Congress directed the Commission to ensure that Guidelines ranges for crimes of violence against elderly victims were "sufficiently stringent" and suggested an enhancement for repeat offenders, Pub. L. No. 103-322, § 240002, 108 Stat. 2081, the Commission reviewed the applicable Guideline and concluded that the current penalties "generally appear[ed] appropriate," Guidelines App. C amend. 521.

mum sentences, and they treat sentence-enhancing facts under the Guidelines as analytically equivalent to sentence-enhancing facts under the pre-Guidelines regime. Indeed, the majority in *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam), was unmoved by Justice Stevens' dissent, even though it embraced the precise relationship between the Guidelines and the Code that respondents suggest and argued that the flaw in Watts's sentence was solely the failure to require proof beyond a reasonable doubt. *Id.* at 162 & n.2, 166 & n.4, 169. Second, as one of respondents' own amici recognizes (FAMM Br. 17 n.11), if *Blakely* were held to apply to the Guidelines, each of those four Guidelines decisions would no longer be good law.[2]

Thus, even if applying *Blakely* to the Guidelines would not technically "overrule" the four decisions of this Court, it hardly follows that the Court should disregard the fact that, as Judge Lynch has observed, those decisions "affirmed sentences that would appear to present the very concerns that [respondents] now argue invalidate the Guidelines." *Emmenegger*, 329 F. Supp. 2d at 429. Respondents contend that

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[2] *United States* v. *Dunnigan*, 507 U.S. 87 (1993), which holds that a defendant's offense level can be increased on the basis of trial perjury, would no longer be law because it would be impossible for the government to charge in the indictment and prove at trial that the defendant did something that he had not yet done. *Witte* v. *United States*, 515 U.S. 389 (1995), which holds that there is no double-jeopardy bar to prosecuting a defendant for a drug transaction used to increase his offense level in an earlier prosecution, would no longer be law because the drug transaction would likely be considered a lesser included offense of the earlier prosecuted offense and the Double Jeopardy Clause prohibits a prosecution for a lesser included offense after a prosecution for the greater one. *Watts*, which holds that a defendant's offense level can be increased on the basis of conduct of which he was acquitted, would no longer be law for the obvious reason that the jury in a case like that one has affirmatively declined to find that the sentence-enhancing conduct in question was proved beyond a reasonable doubt. And *Edwards* v. *United States*, 523 U.S. 511 (1998), which holds that drug quantity may be found by the sentencing judge, would no longer be law for the obvious reason that, as a sentence-enhancing fact, drug quantity would have to be found by the jury.

the logic of *Blakely* requires that sentence-enhancing facts under the Guidelines be found by the jury, but the logic of *Dunnigan*, *Watts*, *Witte*, and *Edwards* compels the opposite conclusion, and *Blakely* did not address the question presented in this case anymore than they did. See *Blakely*, 124 S. Ct. at 2538 n.9.

2. A holding that *Blakely* applies to the Guidelines not only would mean that *Dunnigan*, *Witte*, *Watts*, and *Edwards* are no longer good law; as the government pointed out in its opening brief (at 38), it would also call into question *Mistretta* itself. Disagreeing with that view, amicus Families Against Mandatory Minimums points out (Br. 15-17) that *Mistretta* did not involve a Sixth Amendment issue. Cf. Fanfan Br. 38-40. The implications for *Mistretta*, however, cannot so easily be dismissed.

If *Blakely* applies to the Guidelines, any fact that increased a defendant's offense level would be an element, or at least the "functional equivalent" of an element, of a greater offense. See *Apprendi*, 530 U.S. at 494 n.19. In other words, for constitutional purposes, the enhancing Guidelines fact would become an essential element of an aggravated crime. That, in turn, would mean that the Sentencing Commission sets the maximum penalty for the simplest form of virtually every offense defined by Congress, and that it both defines and sets the maximum penalty for dozens (and in some cases hundreds) of aggravated forms of that offense. If that is what the Commission does, then, contrary the Court's premise in rejecting a separation-of-powers challenge to the Guidelines in *Mistretta*, it would appear that the Commission *is* engaged in the "business of determining what conduct should be criminalized," *Mistretta*, 488 U.S. at 407, and that it *does* establish "maximum penalties for every crime," *id.* at 396. As the en banc Fourth Circuit has put it: "*Mistretta* * * * rejected a constitutional challenge to the guidelines on the basis that the Sentencing Commission performs not a legislative function, but a judicial one. Application of *Blakely* to the guidelines * * * would require a

conclusion that the Sentencing Commission performs not a judicial function, but a legislative one." *United States* v. *Hammoud*, 2004 WL 2005622, at *26 (Sept. 8, 2004).

C. If *Blakely* Would Require That The Guidelines Offense Level Be Treated As The Statutory Maximum Sentence, That Aspect Of *Blakely* Should Be Reconsidered

The government argued in its opening brief (at 39-43) that, if *Blakely* did not merely apply *Apprendi* but instead "redefined 'statutory maximum,'" 04-104 Pet. App. 10a, to mean "the upper bound on a judge's sentencing discretion," *Blakely*, 124 S. Ct. at 2546 (O'Connor, J., dissenting), then the decision should to that extent be reconsidered. The government pointed out (Br. 39-40) that *Blakely* offered no direct historical support for broadening the definition of "element" from a fact that increases the statutory degree of the offense to a fact that raises the upper limit on the discretion of the trial court to sentence within statutory limits. Respondents and their amici do not offer any historical support either. Instead, one of the respondents faults the government for "offer[ing] no historical analysis of its own." Booker Br. 22 n.10. That criticism misses the point, which is that there *is* no historical evidence on the question (because structured sentencing did not exist when the Bill of Rights was adopted), and that, in the absence of any such evidence, or a clear textual command (which is also absent), there is no warrant for the Court to second-guess the judgment of Congress and the Commission that a fact that increases a sentence within the statutory range may be found by the judge rather than the jury. See *Harris* v. *United States*, 536 U.S. at 560 (plurality opinion).

II. THE GUIDELINES CANNOT BE APPLIED AS BINDING SENTENCING RULES IN CASES WHERE JURY FACTFINDING WOULD BE REQUIRED

If this Court holds that *Blakely* applies to the Guidelines, it must determine which parts of the federal sentencing

scheme remain in force. Respondents' proposal—to have this Court declare that the Guidelines will operate with new *Blakely*-mandated procedures—would require rewriting the statute to make "sentencing court" mean "jury," and would treat the Guidelines exactly as if they provided elements and statutory maxima of never-enacted federal crimes. While respondents argue (Booker Br. 33 n.19; Fanfan Br. 31 n.11) that the provision in 28 U.S.C. 994(a)(1) that the Guidelines be directed to the "sentencing court" does not constitute a directive that judges, not juries, be responsible for Guidelines application, it is perfectly clear that, in the context of 28 U.S.C. 994(a)(1), Congress was expressing its intention to regularize the process of *judicial* sentencing, not to work a fundamental restructuring of the role of judge and jury at sentencing. The statutory language ("sentencing court") reflects that choice. As this Court has noted, "[m]any cases may be found in which the words 'court' and 'judge' were held to have been used interchangeably," *In re United States*, 194 U.S. 194, 196 (1904), while the term "court" is frequently used in contradistinction to "jury," see, *e.g.*, *McKaskle* v. *Wiggins*, 465 U.S. 168, 183 (1984) (referring to counsel's appearance "before the court or jury"). The legislative history confirms the logical understanding of the text. See S. Rep. No. 225, 98th Cong., 1st Sess. 51 (1983) ("[t]he sentencing guidelines system * * * will guide the judge in making his decision on the appropriate sentence"); U.S. Br. 48-49.

Attempting to apply the Sentencing Guidelines while requiring jury verdicts on sentence-enhancing facts would produce a distorted and unmanageable system that would regularly produce sentences that were not proportional to the offense of conviction, failed to recognize important differences between defendants, and failed to operate in a consistent manner. Such a system was not adopted by Congress or the Sentencing Commission. And, critically, the resulting scheme would itself be subject to grave constitutional doubts, because treating Guidelines factors as elements of

offenses and the upper bounds of Guidelines' ranges as statutory maxima would undermine an essential premise of *Mistretta*, *i.e.*, that Congress had *not* delegated to the Sentencing Commission the authority to define federal criminal offenses.

A. The Current Sentencing Guidelines System Rests On A Premise Of Judicial Factfinding

Respondents correctly identify the goals of the Sentencing Reform Act as proportionality, uniformity, and honesty in sentencing. See Fanfan Br. 28-29; Booker Br. 28. They argue that "[n]one of the three goals * * * depends upon the identity of the factfinder or the burden of persuasion," Fanfan Br. 29, and that therefore "the Guidelines can easily be squared with the Sixth Amendment" by transferring to juries the responsibility for finding sentence-enhancing facts, *id.* at 31.[3]

The remedial question in this case, however, is not whether Congress *could* construct a constitutional determinate sentencing regime based on jury factfinding. See Booker Br. 38. Rather, the remedial question in this case is whether this Court, after striking down the sentencing scheme Congress and the Commission in fact created, can conclude that the *current* statute and the *current* Guidelines, with a judicially imposed overlay of jury factfinding on sentence-enhancing facts, would produce a manageable, constitutionally valid system that can be understood to reflect

[3] Respondents are correct that the goal of "honesty" was accomplished by abolishing parole, Fanfan Br. 29, as well as by limiting judicial authority to alter sentences after they have been pronounced and limiting good-time credits. See 18 U.S.C. 3624(b); Fed. R. Crim. P. 35(b) (1983). The abolition of parole would continue to serve that purpose regardless of whether the Court ultimately agrees with the government or respondents concerning the proper remedy in this case. Thus, although the government believed at the time of *Mistretta* that, if the Guidelines were invalidated, the provisions abolishing parole were inseverable, see 87-1904 & 87-7028 U.S. Br. 60-62, that is no longer the government's view.

congressional intent. The answer to that question is clearly no.

1. *Proportionality and uniformity.* Respondents agree that proportionality ("impos[ing] appropriately different sentences for criminal conduct of different severity," Guidelines § 1A1.1 editorial note (A)(3)), and uniformity ("narrowing the * * * disparity in sentences imposed * * * for similar criminal conduct by similar offenders," *ibid.*) were vital goals of the Sentencing Reform Act. Indeed, the two goals are tied together, because a system that consistently produces sentences that are proportional to the defendant's conduct necessarily will achieve the goal of uniformity as well.

a. Contrary to respondents' contention (Booker Br. 43 n.25), a great deal of the *substance* of the present Sentencing Guidelines rests on the premise that judges—not juries—would be responsible for finding facts relevant only to sentencing. See U.S. Br. 50. For example, the Sentencing Commission generally set base offense levels low, with increases for aggravating factors, based on the premise that consideration of multiple, potentially complex aggravating factors would be determined by judges by a preponderance of the evidence. See *id.* at 50-51. The central decision to carry forward traditional sentencing practice by making sentences turn on "real offense" factors was premised on judicial factfinding. See *id.* at 56-58; see also *Witte* v. *United States*, 515 U.S. at 403 (relevant conduct carries forward long-accepted recognition that "a particular offense should receive a more serious sentence within the authorized range if it was either accompanied by or preceded by additional criminal activity"). And Congress's authorization for upward departures based on factors not specified in the Guidelines, see 18 U.S.C. 3553(b), was similarly based on the premise of judicial factfinding. See U.S. Br. 56. If the judicial factfinding underlying all of those features of the Guidelines were deemed impermissible, the system would be distorted and would result in *non*-proportional sentences.

Respondents argue that one aspect of the distortion—the "asymmetry" between the government's burden to prove enhancements to a jury beyond a reasonable doubt and the defendant's burden to prove reductions to the court by a preponderance—is familiar in the criminal law and of no consequence. Fanfan Br. 40; Booker Br. 31. But legislatures shape the elements of criminal offenses with an awareness of the different burdens that must be borne by the government and the defendant, see *Patterson* v. *New York*, 432 U.S. 197 (1977), and tailor the substance of the provisions accordingly to ensure appropriate punishment. The Sentencing Guidelines were shaped under the premise that the government's burden of proving enhancements would be the same as the defendant's burden of proving reductions. To apply the existing Sentencing Guidelines with an asymmetrical burden of proof would necessarily result in distorted results that do not reflect the genuine intent of Congress or the Commission. Judicial factfinding is "essential" to the current Sentencing Guidelines system "as a whole." *Tilton* v. *Richardson*, 403 U.S. 672, 684 (1971).

b. Respondents argue that at least the goal of uniformity —the consistent treatment of like offenders—would be served by maintaining the Guidelines as binding sentencing rules with an overlay of jury factfinding. But the courts cannot pursue that ultimate legislative *goal* through procedural *means* that Congress never envisioned and did not provide for. See U.S. Br. 45, 59-63. The judicial lawmaking required is too ambitious and the impact on the federal criminal-justice system is too severe. The Sentencing Commission advises that, based on staff analysis of 2002 statistics, approximately 65% of federal criminal cases are projected to involve the application of sentence-enhancing Guidelines factors (other than prior convictions) that, under

respondents' view, would have to be submitted to the jury (absent a guilty plea that resolved those issues).[4]

Some of those cases could involve a large number of such potential enhancements, and many of the enhancements were not drafted to be suitable for jury use. See U.S. Br. 54-57. For example, one opinion sets forth a supplemental 20-page verdict form that the government believed would be required to obtain the findings necessary to apply the Guidelines in a multi-defendant drug case. See *United States* v. *Medas*, 323 F. Supp. 2d 436, 448 (E.D.N.Y. 2004) (after setting forth the proposed verdict form, observing that the relevant-conduct guideline alone is explained by "8 1/2 pages of single spaced Commentary and Application Notes relevant portions of which would surely be necessary to include in the jury's instructions if their findings were to be reliably informed"). This is not a criminal-justice process that Congress or the Commission ever devised, nor one the courts should unleash without a clear directive from Congress. Cf. *United States* v. *Jackson*, 390 U.S. 570, 579-580 & n.17 (1968); U.S. Br. 59-63. Until Congress can re-design a sentencing system in the light of this Court's new Sixth Amendment jurisprudence, the government's approach would at least *permit* judges to impose appropriate sentences, rather

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[4] While 97.1% of federal cases resulted in guilty pleas in the most recent year (2002) for which the Sentencing Commission data is available, see *2002 Sourcebook of Federal Sentencing Statistics* 20, that statistic is not an accurate predictor of the impact of applying *Blakely* to the Guidelines. In many pre-*Blakely* cases, pleas were based on the knowledge that courts would resolve disputed sentencing factors. But it is entirely unclear under respondents' proposals whether a defendant may enter a guilty plea to the statutory offense, while reserving a right to contest Guidelines enhancements before a jury; and, if so, whether the defendant has accepted responsibility under Guidelines § 3E1.1. This is one of the critical procedural conundrums created by applying *Blakely* to the Guidelines for which Congress (and the Commission) have provided no answer—and which the courts should not attempt to answer on their own. See U.S. Br. 59-63. The answer to that question, moreover, is critical to assessing how dramatic the impact of applying *Blakely* to the Guidelines would be.

than requiring them (especially in cases like the present ones) to impose sentences that, in the view of the Commission, would not "reflect the seriousness of the offense, * * * promote respect for the law, and * * * provide just punishment for the offense." 18 U.S.C. 3553(a)(2)(A).[5]

2. *Manageability.* Respondents argue that a system of jury factfinding under the present Sentencing Guidelines would be manageable, because "juries are fully equipped to handle the complicated factfinding" that would be required. Fanfan Br. 34. But if the Guidelines were applied with a judicially imposed jury-trial overlay, seemingly limitless new opportunities for litigation and uncertainty would be created as courts attempt to reduce complicated Guidelines factors to jury instructions and fill in the procedural gaps required to establish the new sentencing scheme. See U.S. Br. 61-62. The Court should not assume that Congress would have intended to impose those burdens on courts, the government, and defense attorneys. In fact, the Commission recognized

[5] Amicus NACDL (but not respondents) briefly asserts (Br. 19) that sentencing respondents within the range specified in the statutes under which they were convicted would "violate the Ex Post Facto Clause," because it "would substitute the higher statutory maximum for the lower Guidelines maximum to which respondents previously had a 'legal right' at the time of the offense." The Ex Post Facto Clause itself, however, would not apply to the Court's determination that respondents' constitutional challenge invalidates the Guidelines as binding rules but leaves Congress's statutory maximums intact. It "has long been settled by the constitutional text and [the Court's] decisions * * * that the Ex Post Facto Clause does not apply to judicial decisionmaking." *Rogers* v. *Tennessee*, 532 U.S. 451, 462 (2001). Moreover, even construed as a claim invoking due process fair-notice concerns, amicus's claim would have no merit. The burden of respondents' argument is that, although Congress purported to give them a legal right to a maximum term of imprisonment based on facts found by a judge under the Sentencing Guidelines, that scheme violated the Sixth Amendment. If their claim is correct, then they never had a "legal right" to be sentenced to no more than the Guidelines maximum. Moreover, at no time did respondents ever have reason to think that they would receive a sentence lower than the maximum Guidelines sentence for their primary conduct, without regard to charging decisions or which factfinder evaluated that conduct.

when it promulgated the Guidelines that introducing "[a] fact-finding process for sentencing decisions that has all the attributes of a formal trial could consume many times the resources devoted to the resolution of guilt or innocence" and "would render the sentencing process completely unworkable." United States Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* ch. 6, at 45 (June 18, 1987). See U.S. Br. 55.

Respondents and their amici argue (Fanfan Br. 34-35; NACDL Br. 29) that some of the procedural obstacles can be overcome through the use of special interrogatories and bifurcated proceedings—mechanisms that are already used in federal capital cases. See 18 U.S.C. 3593(b). Capital cases require an enormous expenditure of resources by the government, the courts, and the defense bar. If capital-type procedures became commonplace in a significant set of routine criminal cases, the criminal-justice system could not function. Respondents argue (Fanfan Br. 35) that, since *Apprendi*, "juries have been charged with finding facts triggering the complex graduated sentencing scheme for drug offenses" under 21 U.S.C. 841(b). For most drugs, however, Section 841(b) creates a relatively simple three-tiered set of sentences depending primarily on drug quantity. Jury factfinding on Guidelines enhancements may implicate a vastly larger number of potential facts that are defined with far greater complexity and that invoke concepts such as "relevant conduct" that, if submitted to the jury at all, would bring the criminal trial far from its appropriate focus. See U.S. Br. 56-57.

B. Requiring Jury Factfinding Under The Guidelines Would Invite—Not Avoid—Serious Constitutional Doubt

Requiring the submission to a jury of Guidelines sentence-enhancing factors would raise serious constitutional doubts under long-recognized separation-of-powers principles and this Court's decision in *Mistretta*. The Court in *Mistretta*

recognized that "the unique composition and responsibilities of the Sentencing Commission give rise to serious concerns about a disruption of the appropriate balance of governmental power among the coordinate Branches." 488 U.S. at 384. But the Court ultimately concluded that there was no constitutional impropriety, in part because the Guidelines "do not bind or regulate the primary conduct of the public or vest in the Judicial Branch the legislative responsibility for establishing minimum and maximum penalties for every crime." *Id.* at 396. A determination that facts that enhance sentences under the Guidelines will be submitted to juries as elements with the upper bound of the Guidelines range functioning as a statutory maximum, however, would call the Court's premise in *Mistretta* into question. If facts that the Guidelines treat as sentence-enhancing are henceforth submitted to the jury, such facts will operate as the "functional equivalent" of elements of offenses under *Apprendi*. See 530 U.S. at 494 n.19. And the Commission would thus be defining crimes and the maximum punishment for such crimes through Guidelines never enacted by Congress. There is no constitutional precedent for creation of a non-legislative body whose sole function is to promulgate federal criminal law, on which Article III judges are appointed to serve. See U.S. Br. 64-65. Moreover, there is almost 200 years of precedent for the principle that establishing the elements of federal crimes is the province of Congress. See *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812).

Respondents argue that "[j]ury factfinding is not constitutionally doubtful," Fanfan Br. 38, and that the "procedural questions" of whether judge or jury must find sentence-enhancing facts "have nothing to do with" the separation-of-powers issue in *Mistretta*, *id.* at 39. That is not correct. While Congress could authorize jury factfinding at sentencing, the origins of the Guidelines have profound implications for judicially imposing them as elements of crimes that can henceforth be found by the jury. The conclusion that juries may find facts specified by the Sentencing Commission

would transform the Commission's work product into "elements"—and thus undermine the Court's premise in *Mistretta* that the Commission in regularizing sentencing was only performing a function "clearly attendant to a central element of the historically acknowledged mission of the Judicial Branch." 488 U.S. at 391. In short, while a system of determinate jury sentencing is one possible legislative response to a decision applying *Blakely* to the Guidelines, it is a response that must come from the legislature.

C. Employing The Guidelines As Advisory In A Limited Class Of Cases Is An Appropriate Remedy

The government's position is that, if *Blakely* applies to the Guidelines, in a case in which a sentence-enhancing factor (other than the fact of a prior conviction) would have to be submitted to a jury, the Guidelines would become merely advisory rules. Respondents argue that maintaining the Guidelines as binding rules for cases in which no Guidelines enhancements are applicable and thus no Sixth Amendment issue is raised, while rendering them advisory in cases like the instant cases, would create a "system [that] is so far beyond what Congress could have imagined that it must be rejected." Fanfan Br. 48; see Booker Br. 34-36. But if this Court reaches the remedial question at all, the resulting system will not be as Congress and the Commission imagined. Nonetheless, in cases without sentence-enhancing facts, the Guidelines can operate precisely as Congress and the Commission intended without implicating any Sixth Amendment issue. Thus, because *Blakely*'s Sixth Amendment rule casts no doubt on continued use of the Guidelines in cases in which no enhancing facts are applicable, the relevant statutes validly mandate the application of the Guidelines to such cases.[6] There is no warrant for invalidating the Guidelines

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[6] Contrary to respondents' contention, "a mere claim that a sentence-enhancing fact must be found," Booker Br. 35 n.21, would be insufficient to render the Guidelines non-binding. If the sentencing court in fact finds no such sentence-enhancing fact applicable, it can constitutionally apply the

across the board, even in cases without a Sixth Amendment issue. See, *e.g.*, *Sabri* v. *United States*, 124 S. Ct. 1941, 1948-1949 (2004) (facial constitutional challenges are discouraged). And, while the use of two different sentencing schemes would no doubt lead to less proportionality and uniformity in sentencing than the present system, so would each of the other remedial alternatives before the Court. Allowing the Guidelines to continue to be used as judicially administered sentencing rules where their constitutionality is unquestioned would better serve Congress's goals than jettisoning them in all cases. At the same time, forcing the Guidelines into a *Blakely* mold in cases like the present ones results in windfall sentences and a sentencing regime for the future that turns the Guidelines into an unworkable and constitutionally doubtful substitute for a revised criminal code.

Respondents criticize the fact that the government's remedy would "leav[e] in place as severable much of the [Sentencing Reform] Act itself—its elimination of parole, its statutory good time formula, supervised release, and its limitation of motions to modify a sentence to the prosecution's use." Booker Br. 34; see Fanfan Br. 48. But that is in keeping with the presumption in favor of severability. See *Regan* v. *Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality opinion). The features of the Sentencing Reform Act to which respondents refer serve their valid and intended purposes independent of the validity of the Sentencing Guidelines. See note 3, *supra*. Accordingly, there would be no basis to invalidate the portions of the Sentencing Reform Act that put those features into place.

Respectfully submitted.

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Acting Solicitor General

SEPTEMBER 2004

Guidelines as written. The Guidelines would be rendered advisory only in cases in which the court would, absent Sixth Amendment concerns, impose a Guidelines enhancement based on a factual finding.

(9) (8)

Nos. 04-104 and 04-105

Supreme Court, U.S.
FILED
SEP 1 - 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

—v.—

FREDDIE J. BOOKER,

Respondent.

—and—

UNITED STATES OF AMERICA,

Petitioner,

—v.—

DUCAN FANFAN,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF *AMICI CURIAE* AN AD HOC GROUP OF FORMER FEDERAL JUDGES IN SUPPORT OF NEITHER PARTY

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 5

ARGUMENT 7

A Jury Trial Is Not Required With Respect to Sentencing Factors Because District Court Judges Have Substantial Discretion to Depart from the United States Sentencing Guidelines. 7

A. The Federal Guidelines Do Not Alter The Statutory Maximum Sentence Or The Elements Of Any Crime 10

B. The Guidelines Quantify Traditional Sentencing Factors. 12

C. The Guidelines Preserve Substantial Judicial Discretion. 13

CONCLUSION 25

TABLE OF AUTHORITIES

Page

Cases:

Apprendi v. New Jersey,
530 U.S. 466 (2000) 8-9, 11

Blakely v. Washington,
124 S. Ct. 2531 (2004) ..... *passim*

Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council,
485 U.S. 568 (1988) 22-23

Harris v. United States,
536 U.S. 545 (2002) 23

Koon v. United States,
518 U.S. 81 (1996) ..... *passim*

Mistretta v. United States,
488 U.S. 361 (1989) 8, 10

United States v. Blas,
360 F.3d 1268 (11th Cir. 2004) 22

United States v. Booker,
375 F.3d 508 (7th Cir. 2004) 10, 11, 19

Page

United States v. Emmenegger,
No. 04 CR.334, 2004 WL 1752599
(S.D.N.Y. Aug. 4, 2004) 10, 11, 12-13

United States v. Koch,
No. 02-6278, 2004 WL 1899930
(6th Cir. Aug. 26, 2004) 11, 13, 18-19

United States. v. Lara,
47 F.3d 60 (2d Cir. 1995) 21

United States v. Merritt,
988 F.2d 1298 (2d Cir. 1993) 21, 22

United States v. Mueffelman,
CRIM. No. 01-CR-10387-NG,
2004 WL 1672320 (D. Mass. July 26, 2004) 12

United States v. Osseiran,
798 F. Supp. 861 (D. Mass. 1992) 21

United States v. Pineiro,
377 F.3d 464 (5th Cir. 2004) 10, 11

United States v. Rennert,
374 F.3d 206 (3d Cir. 2004) 22

Williams v. New York,
337 U.S. 241 (1949) 9, 14

Page

Statutes and Regulations:

U.S. Const., Amend. VI 5, 8, 15

18 U.S.C. § 3551 *et seq.*
(Sentencing Reform Act) ..... *passim*

18 U.S.C. § 3553 ..... 10, 15, 16, 22

18 U.S.C. § 3742 10

28 U.S.C. § 994 10

Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act, Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified in scattered sections of 18, 28, and 42 U.S.C.) 18

United States Sentencing Guidelines:

§ 1A1.1 comment. ¶ 4(b) 6, 12

§ 5K1.0 20

§ 5K2.0 ..... 16, 18, 20, 21

Miscellaneous:

Senate Report No. 98-225, 2d Sess. (1984) 16

Page

United States Sentencing Commission, *1999 Annual Report* 17-18

United States Sentencing Commission, *Sourcebook of Federal Sentencing Statistics*, Tables 26 and 27 (Fiscal Year 2002) 20, 21

Marvin E. Frankel, *Criminal Sentences: Law Without Order* (1973). 7

State of Washington Sentencing Guidelines Commission, *Statistical Summary of Adult Felony Sentencing, Fiscal Year 2003* (Jan. 2004) 20

Supreme Court Rule 37 1

INTEREST OF *AMICI CURIAE*[1]

All *amici curiae*, who are identified below, have served as either a United States District Court Judge or a Circuit Court of Appeals Judge. While some of them served prior to the effective date of the Sentencing Reform Act of 1984, many of them have substantial experience in imposing sentence under the Act. As a result of their service on the federal bench, each has a particularly strong interest in the quality of justice rendered in the federal courts, and in particular in the fairness of our sentencing system.

Not all *amici* necessarily prefer the federal Guidelines sentencing regime established by the Act to the pre-existing sentencing practice. Each of the *amici* agrees, however, on the need for some set of standards to guide the exercise of a district judge's sentencing discretion; each also believes that a higher quality of justice will result from a sentencing guideline regime that provides district judges with reasonably broad discretion to depart from a guideline sentence that is not within the heartland of cases to which the guidelines were intended to apply.

It is the position of *amici* that preserving a guidelines system that retains substantial judicial discretion and permits sentencing judges to make the factual findings that will determine how they exercise their traditional sentencing

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[1] Pursuant to Sup. Ct. R. 37, *amici curiae* state that this brief has not been authored in whole or in part by counsel for a party in this case, and no entity other than the *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk.

power will result in more just sentences than would result if this Court were to require a jury verdict on all sentencing factors that may increase a sentence. While conferring reasonable discretion on district judges may run the risk of increased disparity, denying them that discretion results in greater injustice to individual defendants.

Amici curiae include the following:

Jim R. Carrigan
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District of Colorado, 1979-1995

Charles Clark
United States Court of Appeals
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Southern District of New York, 1987-1993

John G. Davies
United States District Court
Central District of California, 1986-1998

Louis J. Freeh
United States District Court
Southern District of New York, 1991-1993

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Eastern District of Michigan, 1986-2000

Frederick B. Lacey
United States District Court
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United States District Court,
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Herbert J. Stern
United States District Court
District of New Jersey, 1973-1987

Alfred M. Wolin
United States District Court
District of New Jersey, 1987-2004

Donald E. Ziegler
United States District Court
Western District of Pennsylvania, 1978-2003

INTRODUCTION AND SUMMARY OF ARGUMENT

The petition for a writ of certiorari in these cases presents two questions: (1) whether the Sixth Amendment requires a jury trial with respect to factors, other than a prior conviction, that may enhance a sentence under the federal Sentencing Guidelines; and (2) if the answer to that question is yes, would that requirement invalidate the Guidelines as a whole or render them severable for constitutional purposes. In this *amicus* brief, we address only the first of these questions.

In the aftermath of this Court's decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), federal courts have been mired in doubt over whether the federal Sentencing Guidelines violate a defendant's Sixth Amendment right to a jury trial as formulated by the *Blakely* majority. Yet, important distinctions exist between the federal Guidelines and the Washington sentencing scheme at issue in *Blakely*. Unlike the Washington system, the Guidelines do not establish statutory maximum sentences, nor do the Guidelines functionally alter the elements of federal crimes. Instead, the sentencing adjustments provided for by the federal Guidelines largely codify sentencing factors that judges have historically considered in imposing sentence.

An equally critical consideration is that the federal Guidelines preserve a judge's ability to depart from the Guideline sentencing range in appropriate cases. In imposing sentence, a district judge is limited only by the statutory range for a particular offense as set forth by Congress. As a result of this significant departure power, *amici* urge this Court to uphold the constitutionality of the Guidelines by recognizing that the federal Guidelines contain sufficient judicial

discretion so as not to trigger a defendant's right to a jury trial on any of the many factors that may conceivably increase an individual defendant's sentence.

The Guidelines do not merely approximate, through mandatory rules, the process and considerations judges have traditionally applied when exercising the discretion afforded by an indeterminate scheme to impose a sentence within a statutory range. The Guidelines also substantially *preserve* a court's sentencing discretion, delegating the ultimate sentencing authority to individual judges, who may depart from the range identified by the Guidelines where that range does not adequately address the individual circumstances of a particular case. This Court's opinion in *Koon v. United States*, 518 U.S. 81 (1996), articulates the breadth of the judicial discretion inherent in the Guidelines, underscoring the indeterminate nature of the federal scheme as one that does not compel a judge to impose a particular Guideline sentence. This substantial departure power takes into account "the vast range of human conduct potentially relevant to a sentencing decision." USSG § 1A1.1 comment. ¶ 4(b) (2003).

Because federal judges possess this substantial ability to depart from a Guideline range, the federal scheme does not implicate a defendant's right to have a jury decide facts that may increase a sentence pursuant to the holding announced in *Blakely*. Moreover, the ability to exercise broad judicial discretion is a crucial component of a just sentencing system — each individual defendant standing before a court presents a unique set of circumstances; those individuals are best served by a system in which judges apply their expertise to the determination of facts that should properly and justly influence sentences of imprisonment.

ARGUMENT

A Jury Trial Is Not Required With Respect to Sentencing Factors Because District Court Judges Have Substantial Discretion to Depart from the United States Sentencing Guidelines.

For much of the 200 years of our nation's history preceding the adoption of the Sentencing Reform Act of 1984, federal judges considered a variety of factors that either aggravated or mitigated the sentences imposed upon criminal defendants. For example, while not necessarily articulating the fact that "acceptance of responsibility" would reduce a sentence, judges regularly considered imposing lower sentences on those who pleaded guilty than on those who chose to go to trial, and any competent criminal defense attorney would warn a client that, if the client testified and the judge did not believe him, his sentence could be greater. Similarly, those who distributed large quantities of narcotics generally received longer sentences than those who sold small amounts; the length of the sentence of one convicted of fraud would generally be influenced by the amount of loss suffered by the victims; and with respect to all crimes, the leader of the criminal activity could expect to receive a greater sentence than a codefendant who was only minimally involved.

Because different judges gave varying weight to particular factors, and because the appellate courts refused to review sentences for abuse of discretion, the pre-guideline system resulted in substantial sentencing disparity. *See generally* Marvin E. Frankel, *Criminal Sentences: Law Without Order* (1973). In response to this inequity, and after considerable study, Congress enacted the Sentencing Reform Act of 1984, 18 U.S.C. § 3551 *et seq.*, which established a Sentencing Commission charged with developing guidelines

for district judges to follow in imposing sentence. As Justice Blackman observed for the Court in *Mistretta v. United States*, 488 U.S. 361 (1989):

> Prior to the passage of the Act, the Judicial Branch, as an aggregate, decided precisely the questions assigned to the Commission: what sentence is appropriate to what criminal conduct under what circumstances. It was the everyday business of judges, taken collectively, to evaluate and weigh the various aims of sentencing and to apply those aims to the individual cases that came before them. The Sentencing Commission does no more than this, albeit basically through the methodology of sentencing guidelines, rather than entirely individualized sentencing determinations.

Id. at 395.

The question now before the Court is whether, in light of *Blakely*, this change from a system of individualized discretion to one in which an individual judge's discretion is fettered by the collective discretion of the Sentencing Commission, *see Mistretta*, 488 U.S. at 396, has so changed the nature of the federal sentencing process that a jury trial is required with regard to any factor that may enhance a sentence under the Guidelines.

In *Blakely*, this Court ruled that Washington's statutory sentencing system, which provided for an increased sentence if a particular factor was present, violated the Sixth Amendment rule set forth in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which dictates that "[o]ther than the fact of a

prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. The *Blakely* Court ruled, in effect, that the Washington system was a determinate statutory sentencing scheme and therefore a jury must make the necessary factual determinations before a sentence can be enhanced beyond the maximum sentence required by the jury's verdict. At the same time, the Court recognized that in the traditional model of indeterminate sentencing within a fixed statutory range, under which courts consider a variety of factors when imposing sentence, a jury need not determine all factors that might increase an offender's sentence. *See Blakely*, 124 S. Ct. at 2540 ("Indeterminate sentencing . . . increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty."); *see also Williams v. New York*, 337 U.S. 241, 246 (1949) ("[B]oth before and since the American colonies became a nation, courts . . . practiced a policy under which a sentencing judge could exercise a wide discretion in the source and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by the law.").

Thus, in evaluating the constitutional soundness of the Sentencing Guidelines under *Blakely*, this Court must consider whether the Sentencing Reform Act of 1984 established the type of determinate statutory sentencing scheme at issue in *Blakely*, or rather, whether the Guidelines represent a sentencing regime more analogous to the traditional indeterminate scheme in which judges have exercised substantial discretion in deciding what punishment to assign within a prescribed statutory range. *Amici* submit that the sentencing regime established by the Sentencing

Reform Act of 1984 is more analogous to the traditional indeterminate scheme because: (1) neither the Act nor the Guidelines change either the sentencing range or the elements of any federal crime; (2) the factors that enhance the Guideline calculation are factors that traditionally have been considered by judges in exercising their sentencing discretion; and (3) as this Court recognized in *Koon*, judges retain substantial discretion to depart from the Guideline-calculated sentencing range.

A. The Federal Guidelines Do Not Alter The Statutory Maximum Sentence Or The Elements Of Any Crime.

The Sentencing Reform Act of 1984 did not change the statutory sentencing range or the elements for any crime. *See United States v. Pineiro*, 377 F.3d 464, 473 (5th Cir. 2004); *United States v. Booker*, 375 F.3d 508, 519-20 (7th Cir. 2004) (Easterbrook, J., dissenting); *United States v. Emmenegger*, No. 04 CR.334, 2004 WL 1752599, at *15-*16 (S.D.N.Y. Aug. 4, 2004). Rather, the Act established a Sentencing Commission within the judicial branch to create guidelines to be used by district judges in imposing sentence and provided for appellate review where a sentence was outside the Guideline range. *See* 18 U.S.C. §§ 3553(a), 3742(a); 28 U.S.C. § 994(a). As this court observed when it upheld the constitutionality of the Guidelines in *Mistretta*, "[the Guidelines] do not bind or regulate the primary conduct of the public or vest in the Judicial Branch the legislative responsibility for establishing minimum and maximum penalties for every crime. They do no more than fetter the discretion of sentencing judges to do what they have done for generations — impose sentences within the broad limits established by Congress." 488 U.S. at 396. This observation was recently reiterated by the Sixth Circuit Court of Appeals:

"[T]he Guidelines are agency-promulgated rules enacted by the Sentencing Commission — a non-elected body that finds its home within the Judicial Branch, the very branch of government . . . that all nine Justices of the Court agree has long exercised considerable discretion over sentencing determinations based on the same kinds of factual determinations that the Guidelines ask federal courts to make." *United States v. Koch*, No. 02-6278, 2004 WL 1899930, at *5 (6th Cir. Aug. 26, 2004).

By contrast, in *Blakely*, as was the case in *Apprendi*, the disputed sentencing scheme authorized judges to increase the *statutory* maximum punishment based on their own findings. As Judge Easterbrook observed in his dissent in *Booker*, "*Blakely* arose from a need to designate one of two statutes as the 'statutory maximum.' Washington called its statutes 'sentencing guidelines,' but names do not change facts." *Booker*, 375 F.3d at 518 (Easterbrook, J., dissenting). *Accord Pineiro*, 377 F.3d at 473; *Emmenegger*, 2004 WL 1752599, at *15-*16.

This distinction is more than formal: "[I]t makes sense in a substantive as well as a formal way to describe the 'standard sentencing range' in *Blakely* as the maximum punishment for that crime. The range is closely tailored to the specific elements of a narrowly-defined crime, and the aggravating factor cited by the judge overlaps almost entirely with the very factor that distinguishes those elements from those of first-degree kidnapping, an entirely distinct crime." *Emmenegger*, 2004 WL 1752599, at *16; *see also Booker*, 375 F.3d 508 at 519 (Easterbrook, J., dissenting) ("*Blakely* treated Washington [as] having established three degrees of kidnapping: the distinction between second- and third-degree kidnapping was deliberate cruelty. Having embedded this

distinction in its statute books, the Court held, Washington could not cut the jury out of the process.").

Thus, as several courts and dissenting judges have convincingly demonstrated, the federal Guidelines do not impose "statutory" maximums in the same manner as the Washington sentencing system.

B. The Guidelines Quantify Traditional Sentencing Factors.

When the Sentencing Commission carried out its mandate under the Sentencing Reform Act, the Commission purposefully did not dramatically change the nature of the factors that judges have traditionally considered in imposing sentences under indeterminate sentencing schemes. Rather, the Commission reviewed past sentencing practices and attempted to quantify the weight to be given to those factors or, in a limited number of instances, identified factors that should not be considered in imposing sentence. *See* USSG §1A1.1 comment. ¶ 4(b). Many of these factors involve open-ended subjective assessments that a jury would have little competence to decide. *See, e.g., United States v. Mueffelman*, CRIM. No. 01-CR-10387-NG, 2004 WL 1672320, at *10 (D. Mass. July 26, 2004) ("The specific provisions of the Guideline Manual were obviously drafted with judges, not juries in mind. In parts, the language is vague — for example, what is a 'vulnerable victim' or an 'otherwise extensive' organization. At times the Commission invented concepts that were entirely new to the criminal law.")

Taking as an example the federal wire fraud statute, which "cover[s] a vast range of behavior in undifferentiated, very general formulations," the *Emmenegger* court observed:

> Unlike many state guideline systems, the federal Guidelines do not set a 'standard sentencing range' for the crime of wire fraud, or for most other crimes of conviction. Rather, the Guidelines provide a methodology for assessing the seriousness of different instances of crime, quite separate from the elements of any particular statutory crime. Where it may make sense to think of the 49 – 53 month 'standard sentencing range' as the operative ordinary maximum punishment for kidnapping in the second degree in Washington, the federal Guidelines defy any effort to identify a 'standard sentencing range' (or a 'statutory maximum' other than the one literally provided by 18 U.S.C. § 1343) for wire fraud. The system simply does not work that way.

Emmenegger, 2004 WL 1752599, at *16; *see also Koch*, 2004 WL 1899930, at *6 (explaining that the Guidelines do not produce a "standard sentence" in the manner of Washington's two-factor sentencing grid).

The manner in which the Guidelines operate to assist judges in calculating sentences further distinguishes them from the regime in *Blakely* — the Guidelines incorporate a number of complex and subtle determinations that fall traditionally within the unique experience of judges as sentencing fact-finders.

C. The Guidelines Preserve Substantial Judicial Discretion.

Under this Court's holding in *Blakely*, whether a sentencing guidelines scheme requires a jury trial on

sentencing factors should depend upon the extent to which a sentencing judge retains the ultimate power to determine the appropriate sentence within the statutory range. This approach is, we believe, consistent with *Blakely*, in which the Court distinguished its earlier holding in *Williams v. New York*, 337 U.S. 241 (1949): "*Williams* involved an indeterminate sentencing regime that allowed a judge (but did not compel him) to rely on facts outside the trial record in determining whether to sentence a defendant to death." *Blakely*, 124 S. Ct. at 2538. Because the federal Guidelines do not compel a sentencing judge to impose the Guidelines-determined sentence, the Guidelines more closely resemble the regime at issue in *Williams* than in *Blakely*.

In analyzing the nature of the federal Guidelines, it is helpful to consider several ways Congress and the courts could have responded to the pre-guideline sentencing disparity problem: (1) Congress or the courts could simply have provided that district judges would have to set forth on the record their reasons for imposing a particular sentence and all sentences would be reviewed on appeal; (2) once appellate review was established, the Judicial Conference of the United States, through its Criminal Law Committee, could have adopted non-binding guidelines to be used by district judges in imposing sentence and by the appellate courts in determining whether there had been an abuse of discretion; or (3) the Chief Justice could have appointed a special committee of outside experts to draw up a set of guidelines to be considered by the district and appellate courts in making sentencing decisions. Because each of these responses would have maintained the existing indeterminate sentencing scheme and simply provided judges with a more rational basis upon which to exercise their discretion, *Blakely* should not compel the conclusion that any of those sentencing schemes

would require a jury finding with respect to any fact that might cause a judge to increase a sentence.

On the other hand, had Congress responded to the sentencing disparity problem by adopting its own set of guidelines providing judges with no discretion to depart from a guideline-determined sentence, Congress would likely have established a determinate sentencing scheme that infringed on the Sixth Amendment right identified in *Blakely*.

We recognize that there is no bright line separating a determinate from an indeterminate sentencing scheme and suggest that the answer to the question of whether a judge or jury should decide a sentencing fact be determined by looking at the extent to which the sentencing judge is able to exercise substantial discretion in imposing sentence. If judges do, in fact, retain the ultimate sentencing authority and are not "compelled" to impose a Guidelines sentence, then there should be no requirement that a jury decide the factual matters that may influence a judge's exercise of discretion. *Amici* submit that under the Sentencing Guidelines — as conceived by Congress, formulated by the Sentencing Commission, and implemented by district judges — courts retain substantial sentencing discretion, and therefore, the Guidelines comply fully with the Sixth Amendment right to a jury trial.

The Sentencing Reform Act expressly recognized that sentencing judges would have the power to depart from a sentence prescribed by the Guidelines range where "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described," 18 U.S.C. § 3553(b), and also

provided that when imposing sentence, a court must consider "the nature and circumstances of the offense and the history and characteristics of the defendant." *Id.* § 3553(a). That authority was expressly incorporated into the Guidelines. *See* USSG § 5K2.0.

That Congress did not intend to cabin judicial discretion is further confirmed by the Senate Judiciary Committee Report on the Sentencing Reform Act, which states:

> The Committee does not intend that the guidelines be imposed in a mechanistic fashion. It believes that the sentencing judge has an obligation to consider all the relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case. The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences.

S. Rep. No. 98-225, 2d Sess., at 52-53 (1984).

In *Koon*, this Court carefully considered both the statutory language and the legislative history of the Sentencing Reform Act and concluded in the eloquent language of Justice Kennedy:

> The goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and so reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice. In this

> respect, the Guidelines provide uniformity, predictability, and a degree of detachment lacking in our earlier system. This, too, must be remembered, however. It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. We do not understand it to have been the congressional purpose to withdraw all sentencing discretion from the United States district judge. Discretion is reserved within the Sentencing Guidelines . . . .

518 U.S. at 113.

The fact that the Sentencing Reform Act did not strip district judges of substantial departure power was confirmed by the Sentencing Commission, when it said, subsequent to the decision in *Koon*:

> Under section 5K2.0 (Grounds for Departure), the Commission granted broad departure authority to district courts by adopting the language of 18 U.S.C. § 3553(b), which provides that a court is permitted to depart from a guideline sentence only when it finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." The discretionary power of district

> courts was broadened by the 1996 decision in *Koon v. United States*.

U.S. Sentencing Comm'n, *1999 Annual Report*, at 25.[2]

The Sixth Circuit recently emphasized the continuing significance of the departure power point post-*Blakely*:

> The Guidelines do not supply a clear "standard sentencing range" for each defendant and indeed represent a form of indeterminate-determinate sentencing because even after application of the hundreds of pages of

[2] The Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act, Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified in scattered sections of 18, 28, and 42 U.S.C.), was signed into law by President Bush on April 30, 2003. Section 401 of the PROTECT Act, commonly known as the Feeney Amendment, and the corresponding amendments made by the Sentencing Commission to the November 2003 Guidelines, USSG §§ 5K2.0(b) and (c) (2003), reduced the discretion of district court judges by limiting the availability of combination-of-factors departures and, in cases involving sexual offenses against children, confining the available bases for departure to those factors identified explicitly in the Guidelines and its policy statements. We note that because the Feeney Amendment's limitation on departure power in cases involving sex offenses against children converts the Guidelines to a determinate sentencing scheme in that context, and because it constrains judicial discretion to depart in all cases, the amendment may constitute an unconstitutional restriction on district court discretion in light of *Blakely*. However, because application of the amendment is not at issue in either of the cases presently before the Court, this Court need not address the constitutionality of the Feeney Amendment.

> Guidelines Manual, to say nothing of relevant case law, to each individual defendant's sentence, judges *still may increase (or decrease) sentences* based on factors not addressed in the Guidelines. No "standard" sentence for categories of defendants thus emerges from the Guidelines in the same way that it does for the two-factor sentencing grid that Washington's legislature adopted.

Koch, 2004 WL 1899930, at *6 (emphasis added, internal citations omitted); *see also Booker*, 375 F.3d at 520 (Easterbrook, J., dissenting) ("Given the matrix-like nature of the system and the possibility of departure, the only finding that is *indispensable* to Booker's sentence is the one specified by the statute: did he distribute more than 50 grams of cocaine base? The jury found beyond a reasonable doubt that he had."). Thus, it cannot be said, within the terms of the *Blakely* decision, that a defendant convicted of a federal crime "has a legal *right* to a lesser sentence" that is violated by the imposition of judge-made findings under the Guidelines. *Blakely*, 124 S. Ct. at 2540.

This Court's opinion in *Koon* firmly establishes that district judges have substantial discretion to depart from a Guidelines sentence. We recognize that some circuit courts of appeal have clearly failed to recognize the breadth of the departure power that *Koon* acknowledged and, in those circuits, the Guidelines in effect operate as a determinate scheme. For example, in the Fourth Circuit, the rate of

departures by district judges under § 5K2.0 is only 6%.[3] *See* Add.-1–3 (U.S. Sentencing Comm'n, *Sourcebook of Federal Sentencing Statistics*, at Table 26 (Fiscal Year 2002)) [hereinafter "*2002 Sourcebook*"].[4] *Amici* submit, however, that the legislative history of the Sentencing Reform Act and this Court's opinion in *Koon* demonstrate that those circuits are in error and that district judges do have broad authority to depart from the Guidelines. While not all lower federal courts have recognized this broad departure power, statistics compiled by the Sentencing Commission demonstrate that many federal judges do recognize a substantial ability to depart from the Guidelines in appropriate cases.

In the last year for which statistics are available, 2002, only 65% of the 58,684 sentences imposed in the federal courts fell within the Guidelines range, and there were § 5K2.0 departures by judges in over 21% of the cases in which a Guidelines sentence was required (*i.e.*, cases other than those in which the government sought a substantial assistance departure). *Id.* These departures occurred in every major offense category. For example, there were § 5K2.0 departure rates of more than 10% in most major offense categories,

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[3] This departure percentage and those that follow are calculated by excluding sentenced cases in which the government sought a substantial assistance departure under § 5K1.0.

[4] Discretionary departures under the Washington sentencing scheme at issue in *Blakely* were even more rare. *See* State of Washington Sentencing Guidelines Comm'n, *Statistical Summary of Adult Felony Sentencing, Fiscal Year 2003*, at 21 (Jan. 2004) (demonstrating that only 4% of Washington State sentences in Fiscal Year 2003 were outside of the standard sentencing range), *available at* http://www.sgc.wa.gov.

including 3,986 such departures in narcotics trafficking cases. *See* Add.-4 (*2002 Sourcebook*, at Table 27). While high rates of § 5K2.0 departures such as those in several of the border districts, for example, 67% in Arizona and 60% in Southern California, resulted in part from "fast track" programs in immigration and narcotics cases, there were high rates of departure in other districts that did not have such programs. *See* Add.-1–3 (*2002 Sourcebook*, at Table 26). For example, judges in the District of Connecticut departed in 40% of the cases that required a Guidelines sentence, and in the Eastern District of New York, judges departed in 35% of such cases.

Sentencing judges have exercised their departure power to impose sentences at the very top of the statutory range, *see, e.g., United States v. Merritt*, 988 F.2d 1298, 1305 (2d Cir. 1993) (upholding decision to apply statutory maximum 60-month sentence where Guidelines offense level would otherwise have resulted in sentence of 30 – 37 months), and at the very bottom, *see, e.g., United States v. Osseiran*, 798 F. Supp. 861, 870 & n.9 (D. Mass. 1992) (sentence for drug-related offense reduced from minimum 151-month term indicated by the Guidelines to the minimum 10-year statutory sentence).

Judges have also employed a variety of reasons to justify both upward and downward departures. For example, courts have successfully authorized departures in cases where the drug quantity tables in the Guidelines did not address "the relationship between the amount of narcotics distributed by a defendant and the length of time it took the defendant to accomplish the distribution," *United States. v. Lara*, 47 F.3d 60, 63 (2d Cir. 1995) (internal quotation marks omitted); where the Guidelines did not adequately take account of the defendant's continuing fraudulent efforts to retain the profits of his crime, *see Merritt*, 988 F.2d at 1305; where defendants

convicted of fraud caused loss of confidence in an important institution (the stock market), *see United States v. Rennert*, 374 F.3d 206, 210 (3d Cir. 2004); and where the defendant knowingly subjected adolescents to HIV through several sexual acts, *see United States v. Blas*, 360 F.3d 1268, 1273-74 (11th Cir. 2004). As these examples illustrate, judicial discretion over sentencing remains both broad and meaningful in those circuits that have recognized the full extent of the Guidelines' departure power.

Were this Court of the view that the 6% rate of departure in the Fourth Circuit accurately reflects the extent of discretion district judges possess in imposing Guidelines sentences, it would be difficult to argue that a jury trial would not be required for sentencing-enhancing factors under *Blakely*'s formulation. If, on the other hand, the 24% departure rate in the Second Circuit accurately reflects the sentencing discretion that this Court recognized in *Koon*, then the sentencing system in the federal courts should be found to be closer to an indeterminate regime than it is to a determinate one, and a jury trial on sentencing factors should not be required under *Blakely*.

Even were this Court to conclude that in order for there to be no jury requirement, district court judges would have to possess even broader departure power than was recognized in *Koon*, the doctrine that statutes should be construed to avoid constitutional questions would favor construing 18 U.S.C. §3553(b) as incorporating as broad a departure power as is necessary to avoid a jury trial requirement. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (noting that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the

statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."). This Court has recognized that this avoidance canon "rests upon our respect for Congress, which we assume legislates in the light of constitutional limitations." *Harris v. United States*, 536 U.S. 545, 556 (2002) (internal quotation marks omitted).

In sum, *amici* submit that the Sentencing Reform Act, which did not change either the elements or the sentencing range for any criminal statute, did precisely what Congress intended — the Act provided a mechanism for informing the discretion of sentencing judges and established standards to guide appellate courts in their review of those sentences. While the lower federal courts have been far from uniform in recognizing the extent of the discretion district judges retain under the Guidelines, those courts that have exercised substantial discretion in departing from the Guidelines have correctly construed the Act and this Court's opinion in *Koon*. Those judges who recognize that they are not compelled to impose a Guidelines sentence should not be compelled to empanel a jury to tell them what facts they may consider in exercising their sentencing discretion.

Those who favor sentencing guidelines observe that such guidelines provide a rational basis for ensuring that defendants who commit similar crimes in similar circumstances will receive similar sentences, and that the length of time that any defendant serves in prison will not depend upon the whim of an individual judge. Those who have opposed sentencing guidelines view them as a rigid mechanism that fails to take into account the infinite variety of facts and circumstances that may differentiate the culpability of individuals convicted of the same statutory offense. The sentencing scheme that *amici* urge this Court to

recognize is one that preserves a system of gui
enables district judges to impose similar se
similarly situated defendants, but reserves to the
judge the substantial discretion that is necessary
every convicted person as an individual and eve
unique study in the human failings that sometim
sometimes magnify, the crime and the punishmer
Koon, 518 U.S. at 113.

While the recognition that district judges hav
discretion under the Guidelines creates a risk
disparity, ending such disparity — a worthy
should not be the principal goal of a sentenc
Instead, the principal goal of any sentencing sc
be to do justice to each individual who comes b
of justice. The only way that we can come close
that goal is by giving district judges the reasonabl
discretion they require to make the punishment fi

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fit the crime.

CONCLUSION

Because each of the courts below held the Guidelines unconstitutional, at least in part, *amici* respectfully submit that the decisions below should be reversed and the cases remanded for resentencing in light of the Court's opinion in this case.

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ADDENDUM

Table 26

GUIDELINE DEPARTURE RATE BY CIRCUIT AND DISTRICT[1]
Fiscal Year 2002 (Prior to Enactment of the PROTECT Act)

CIRCUIT District	TOTAL	SENTENCED WITHIN GUIDELINE RANGE		SUBSTANTIAL ASSISTANCE DEPARTURE		OTHER DOWNWARD DEPARTURE		UPWARD DEPARTURE	
		#	%	#	%	#	%	#	%
TOTAL	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
D.C. CIRCUIT	411	366	89.0	38	9.3	39	9.5	2	0.5
District of Columbia	411	366	89.0	38	9.3	35	8.5	2	0.5
FIRST CIRCUIT	1,813	1,573	86.7	261	14.4	169	9.3	10	0.6
Maine	188	174	92.6	44	23.4	9	4.8	1	0.5
Massachusetts	681	563	82.7	122	20.3	113	18.8	4	0.7
New Hampshire	130	80	61.5	35	26.9	15	11.5	0	0.0
Puerto Rico	788	680	86.3	55	7.0	23	3.0	2	0.3
Rhode Island	136	116	85.3	7	5.2	9	6.7	3	2.2
SECOND CIRCUIT	4,977	3,981	80.3	773	15.5	779	15.7	24	0.5
Connecticut	326	175	53.7	32	9.8	105	32.2	4	1.2
New York									
Eastern	1,385	744	53.8	242	17.5	393	28.4	6	0.4
Northern	359	205	57.1	106	29.5	43	12.0	5	1.4
Southern	1,484	1,046	70.5	223	15.0	130	8.8	5	0.3
Western	430	283	65.8	117	27.2	67	15.6	5	1.2
Vermont	173	86	49.7	53	30.6	51	29.5	1	0.6
THIRD CIRCUIT	2,656	1,964	74.0	598	22.5	209	7.9	25	0.9
Delaware	67	49	73.1	11	16.4	7	10.4	0	0.0
New Jersey	834	498	59.7	241	28.9	78	9.4	5	0.6
Pennsylvania									
Eastern	966	487	50.4	397	41.1	73	7.6	9	0.9
Middle	413	243	58.8	133	32.2	26	6.3	9	2.2
Western	338	257	76.0	63	18.7	20	5.9	0	0.0
Virgin Islands	38	28	73.7	13	34.2	5	13.2	7	18.4
FOURTH CIRCUIT	5,838	3,888	66.6	937	16.1	318	5.4	35	0.6
Maryland	910	506	55.6	301	33.1	97	10.7	6	0.7
North Carolina									
Eastern	269	188	69.9	159	59.1	23	8.6	9	3.3
Middle	433	363	83.8	45	10.4	11	2.5	4	0.9
Western	933	527	56.5	171	18.3	21	2.3	1	0.1
South Carolina	971	711	73.2	229	23.6	28	2.9	3	0.3
Virginia									
Eastern	1,091	1,071	98.2	75	6.9	45	4.1	2	0.2
Western	364	273	75.0	81	22.3	33	9.1	1	0.3
West Virginia									
Northern	260	227	87.3	18	6.9	10	3.8	5	1.9
Southern	398	322	80.9	26	6.5	9	2.3	2	0.5

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Table 26 (cont.)

CIRCUIT District	TOTAL	SENTENCED WITHIN GUIDELINE RANGE n	 %	SUBSTANTIAL ASSISTANCE DEPARTURE n	 %	OTHER DOWNWARD DEPARTURE n	 %	UPWARD DEPARTURE n	 %
FIFTH CIRCUIT	13,331	8,689	71.0	1,835	15.0	1,792	14.7	115	0.9
Louisiana									
Eastern	401	324	80.8	45	11.2	28	7.0	4	1.0
Middle	111	75	67.6	21	18.9	9	8.1	6	5.4
Western	317	257	81.1	42	13.2	15	4.7	3	0.9
Mississippi									
Northern	165	105	63.6	48	29.1	12	7.3	0	0.0
Southern	352	269	76.4	68	19.3	12	3.4	3	0.9
Texas									
Eastern	583	472	81.0	63	10.8	45	7.7	3	0.5
Northern	984	750	76.2	168	17.1	68	6.9	18	1.8
Southern	4,542	3,237	71.3	956	21.2	712	15.7	39	0.9
Western	4,776	3,280	67.0	826	13.1	911	19.1	39	0.8
SIXTH CIRCUIT	4,426	2,959	66.9	1,182	26.0	280	6.3	55	0.8
Kentucky									
Eastern	404	288	71.3	91	24.5	15	3.9	2	0.5
Western	392	303	77.3	67	17.3	18	4.6	3	0.8
Michigan									
Eastern	727	519	71.4	191	22.1	44	6.1	3	0.4
Western	374	217	58.0	115	30.2	33	8.8	11	2.9
Ohio									
Northern	888	560	63.1	280	25.5	80	10.6	6	0.7
Southern	360	213	59.2	113	31.4	31	8.6	3	0.8
Tennessee									
Eastern	613	448	73.1	132	24.0	13	2.1	0	0.0
Middle	305	181	59.3	109	35.7	13	4.3	2	0.7
Western	443	280	63.2	131	29.6	27	6.1	5	1.1
SEVENTH CIRCUIT	2,478	1,855	69.3	984	31.8	218	8.1	21	0.8
Illinois									
Central	324	211	65.1	94	29.0	17	5.2	2	0.6
Northern	1,078	689	63.9	262	24.3	112	10.4	15	1.4
Southern	288	264	88.7	30	10.4	14	4.9	0	0.0
Indiana									
Northern	350	250	71.4	74	21.1	25	7.1	1	0.3
Southern	336	220	65.6	58	18.6	37	11.9	1	0.4
Wisconsin									
Eastern	278	202	72.7	56	20.1	20	7.2	0	0.0
Western	124	109	87.9	10	8.1	3	2.4	2	1.6
EIGHTH CIRCUIT	3,565	2,478	69.5	674	18.9	389	10.7	41	1.2
Arkansas									
Eastern	241	190	82.6	33	13.7	9	3.9	2	0.8
Western	142	108	76.1	28	19.7	6	4.2	0	0.0
Iowa									
Northern	351	233	66.4	83	23.6	28	8.0	7	2.0
Southern	282	184	65.2	56	19.9	41	14.5	1	0.4
Minnesota	363	225	62.0	68	18.7	68	18.7	2	0.6
Missouri									
Eastern	597	455	76.3	106	17.8	35	5.9	1	0.2
Western	636	399	62.7	197	31.0	38	6.0	2	0.3
Nebraska	523	371	67.1	70	13.4	100	19.1	2	0.4
North Dakota	141	101	71.6	17	12.1	17	12.1	6	4.3
South Dakota	289	213	73.4	16	5.5	40	13.8	16	5.2

Table 26 (cont.)

CIRCUIT District	TOTAL	SENTENCED WITHIN GUIDELINE RANGE n	 %	SUBSTANTIAL ASSISTANCE DEPARTURE n	 %	OTHER DOWNWARD DEPARTURE n	 %	UPWARD DEPARTURE n	 %
NINTH CIRCUIT	11,733	5,723	48.8	1,383	11.8	4,540	38.7	86	0.7
Alaska	182	108	59.3	39	21.4	26	14.3	4	2.2
Arizona	3,399	1,048	30.9	241	7.1	2,074	61.0	32	0.9
California									
Central	992	734	74.0	116	11.7	120	12.1	4	0.4
Eastern	732	539	73.6	138	18.9	50	6.8	3	0.4
Northern	698	434	62.2	79	11.3	157	22.5	8	1.1
Southern	2,998	1,120	37.4	229	7.6	1,642	54.8	8	0.3
Guam	128	87	68.0	38	29.7	2	1.6	1	0.8
Hawaii	358	195	54.5	131	36.6	32	8.9	0	0.0
Idaho	178	100	56.2	53	29.8	23	12.9	2	1.1
Montana	344	256	74.4	61	17.7	20	5.8	7	2.0
Nevada	359	207	57.7	55	15.3	67	18.7	4	1.1
Northern Mariana Islands	5	2	40.0	3	60.0	0	0.0	0	0.0
Oregon	502	302	60.2	68	13.5	129	25.7	3	0.6
Washington									
Eastern	272	178	65.4	29	10.7	63	23.2	2	0.7
Western	473	277	58.6	96	20.3	94	19.9	6	1.3
TENTH CIRCUIT	3,833	2,501	65.3	621	16.2	679	17.7	32	0.8
Colorado	569	326	57.3	103	18.1	130	22.8	10	1.8
Kansas	495	369	74.5	76	15.4	44	8.9	6	1.2
New Mexico	1,737	1,064	61.3	85	4.9	564	32.5	24	1.4
Oklahoma									
Eastern	90	56	62.2	5	5.6	29	32.2	0	0.0
Northern	198	122	61.6	33	16.7	41	20.7	2	1.0
Western	182	102	56.0	34	18.7	36	19.8	2	1.1
Utah	542	421	77.7	25	4.6	93	17.2	3	0.6
Wyoming	129	101	78.3	12	9.3	12	9.3	4	3.1
ELEVENTH CIRCUIT	6,223	4,370	70.2	1,395	22.4	414	6.7	44	0.7
Alabama									
Middle	189	91	48.1	89	47.1	9	4.8	2	1.1
Northern	580	379	65.3	158	27.2	39	6.7	4	0.7
Southern	304	190	62.5	101	33.2	10	3.3	3	1.0
Florida									
Middle	1,364	903	66.2	407	29.8	101	7.4	13	1.0
Northern	321	221	68.8	82	25.5	18	5.6	4	1.2
Southern	2,203	1,787	81.1	280	12.7	134	6.1	9	0.4
Georgia									
Middle	311	220	70.7	68	21.9	19	6.1	3	1.0
Northern	951	543	57.1	174	18.3	97	10.2	7	0.7
Southern	271	209	77.1	40	14.8	20	7.4	3	1.1

Of the 66,366 cases, 365 cases with an analogous guideline were excluded from the table. Of the remaining 66,001 cases, 3,317 were excluded due to missing departure information. Districts for which departure information is missing in five percent or more of the cases received included: Central California (64.0%), Eastern Virginia (24.3%), Southern California (22.8%), Delaware (21.2%), Southern West Virginia (20.0%), Eastern New York (19.7%), Western Washington (18.4%), Utah (18.3%), Northern Mariana Islands (16.7%), Eastern Kentucky (16.5%), Puerto Rico (15.8%), Western Oklahoma (14.1%), Northern Indiana (13.2%), Southern Florida (13.1%), Maine (13.0%), Virgin Islands (12.9%), Southern New York (12.3%), Western North Carolina (12.1%), Western Louisiana (11.9%), Idaho (11.8%), Rhode Island (10.0%), Eastern Washington (9.9%), Northern California (9.7%), Northern New York (9.0%), Middle Georgia (8.9%), Southern Ohio (8.8%), Oregon (7.9%), Guam (7.9%), Nevada (7.6%), Western Kentucky (7.1%), Eastern Texas (7.0%), Northern Ohio (7.0%), Minnesota (6.7%), Western Pennsylvania (6.2%), Central Illinois (5.8%), Southern Georgia (5.6%), Eastern Michigan (5.6%), Middle Pennsylvania (5.3%), Middle Florida (5.1%), and Middle Alabama (5.1%). Descriptions of variables used in this table are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, 2003 Datafile, USSCFY2003

Table 27

OFFENDERS RECEIVING DEPARTURES IN EACH PRIMARY OFFENSE CATEGORY[1]
Fiscal Year 2002 (Prior to Enactment of the PROTECT Act)

		SENTENCED WITHIN RANGE		SUBSTANTIAL ASSISTANCE DEPARTURE		OTHER DOWNWARD DEPARTURE		UPWARD DEPARTURE	
PRIMARY OFFENSE	TOTAL	Number	Percent	Number	Percent	Number	Percent	Number	Percent
TOTAL	58,423	37,968	65.0	10,170	17.4	9,828	16.8	457	0.8
Murder	76	50	65.8	4	5.3	9	11.8	13	17.1
Manslaughter	57	37	64.9	1	1.8	6	10.5	13	22.8
Kidnapping/Hostage Taking	57	33	57.9	4	7.0	12	21.1	8	14.0
Sexual Abuse	195	142	72.8	2	1.0	37	19.0	14	7.2
Assault	445	347	78.0	12	2.7	70	15.7	16	3.6
Robbery	1,522	1,051	69.1	227	14.9	220	14.5	24	1.6
Arson	59	38	64.4	14	23.7	4	6.8	3	5.1
Drugs - Trafficking	23,949	13,398	55.9	6,565	27.4	3,932	16.4	54	0.2
Drugs - Communication Facility	421	303	72.0	56	13.3	61	14.5	1	0.2
Drugs - Simple Possession	481	458	95.2	17	3.5	4	0.8	2	0.4
Firearms	4,765	3,501	73.5	581	12.2	602	12.6	71	1.5
Burglary/B&E	42	30	71.4	5	11.9	4	9.5	3	7.1
Auto Theft	151	93	61.6	44	29.2	14	9.3	3	2.0
Larceny	2,438	1,743	83.6	151	7.6	186	6.2	19	0.8
Fraud	6,378	4,539	71.2	1,135	17.8	633	9.9	71	1
Embezzlement	672	588	87.5	24	3.6	58	8.6	2	0.3
Forgery/Counterfeiting	1,363	1,084	80.3	159	11.7	97	7.1	13	1.0
Bribery	148	87	58.8	41	27.7	20	13.5	0	0.0
Tax	537	352	63.2	107	19.2	69	17.1	5	0.5
Money Laundering	852	606	58.7	245	28.9	101	11.9	10	1.2
Racketeering/Extortion	744	474	63.7	179	23.9	75	10.1	17	2.3
Gambling/Lottery	95	57	60.0	27	28.4	11	11.6	0	0.0
Civil Rights	87	60	69.0	16	18.4	11	12.6	0	0.0
Immigration	10,399	6,561	66.0	248	2.4	3,276	31.1	54	0.5
Pornography/Prostitution	613	442	72.1	34	5.5	117	19.1	20	3.3
Prison Offenses	297	229	77.1	19	6.4	46	15.5	3	1.0
Administration of Justice Offenses	1,010	719	71.2	144	14.3	134	13.3	13	1.3
Environmental/Wildlife	121	76	62.8	25	20.7	20	16.5	0	0.0
National Defense	9	6	66.7	1	11.1	2	22.2	0	0.0
Antitrust	16	9	56.3	9	56.3	2	12.5	0	0.0
Food & Drug	77	55	71.4	10	13.0	11	14.3	1	1.3
Other Miscellaneous Offenses	727	592	81.4	68	9.4	58	8.0	9	1.2

[1] Of the 64,366 cases, 5,943 were excluded due to one or both of the following reasons: missing primary offense (393) or missing/inapplicable departure information (5,942). Descriptions of variables used in this table are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, 2002 Datafile, USSCFY02.

28

2781

Supreme Court, U.S.
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(12) (11)

Nos. 04-104 and 04-105

In the Supreme Court of the United States

UNITED STATES OF AMERICA, *Petitioner*,

v.

FREDDIE J. BOOKER, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

UNITED STATES OF AMERICA, *Petitioner*,

v.

DUCAN FANFAN, *Respondent*.

On Writ of Certiorari Before Judgment to the United States Court of Appeals for the First Circuit

BRIEF OF FAMILIES AGAINST MANDATORY MINIMUMS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

STATEMENT 2

SUMMARY OF THE ARGUMENT 5

ARGUMENT 8

I. THE IMPOSITION OF AN ENHANCED SENTENCE UNDER THE GUIDELINES BASED ON FACTUAL DETERMINATIONS NOT AUTHORIZED BY A JURY'S VERDICT OR A DEFENDANT'S ADMISSION VIOLATES THE SIXTH AMENDMENT RIGHT TO TRIAL BY JURY 8

II. THE GOVERNMENT'S PROPOSED REMEDY WOULD REQUIRE THE COURT TO ENDORSE A SENTENCING SYSTEM THAT CONGRESS DID NOT INTEND, WOULD BE UNFAIR IN ITS APPLICATION, AND IS IMPRACTICABLE 22

CONCLUSION 30

Page(s)

Cases:

Apprendi v. *New Jersey*, 530 U.S. 466 (2000) ..... *passim*

Blakely v. *Washington*, 124 S. Ct. 2531 (2004) ..... *passim*

Braxton v. *United States*, 500 U.S. 344 (1991) 27

Edwards v. *United States*, 523 U.S. 511 (1998) 17

Garner v. *Jones*, 529 U.S. 244 (2000) 12

Harris v. *United States*, 536 U.S. 545 (2002) 9

Jones v. *United States*, 526 U.S. 227 (1999) 14

Koon v. *United States*, 518 U.S. 81 (1996) 20-22

McMillan v. *Pennsylvania*, 477 U.S. 79 (1986) 9

Minnesota v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 1782 (1999) 24

Mistretta v. *United States*, 488 U.S. 361 (1989) ..... *passim*

Ornelas v. *United States*, 517 U.S. 690 (1996) 30

Ring v. *Arizona*, 536 U.S. 584 (2002) 4, 13

Stinson v. *United States*, 508 U.S. 36 (1993) 4, 11

United States v. *Dunnigan*, 507 U.S. 87 (1993) 17

Page(s)

United States v. *Emmenegger*, No. 04-CR-334, 2004 WL1752599 (S.D.N.Y. Aug. 4, 2004) 15

United States v. *Frank*, 354 F.3d 910 (8th Cir. 2004) 3

United States v. *Lombard*, 102 F.3d 1 (1st Cir. 1996) 3

United States v. *Lopez*, 938 F.2d 1293 (D.C. Cir. 1991) .. 12

United States v. *Washington*, 11 F.3d 1510 (10th Cir. 1993) 3, 4

United States v. *Watts*, 519 U.S. 148 (1997) 17

Williams v. *New York*, 337 U.S 249 (1949) 9

Witte v. *United States*, 515 U.S. 389 (1995) 17

Constitutional Provisions:

U.S. CONST. art. III 1, 8, 10, 28

U.S. CONST. amend. VI ..... *passim*

Statutes, Rules, Guidelines, and Legislative History:

18 U.S.C. § 3553(a) 29, 30

18 U.S.C. § 3553(b) ..... *passim*

18 U.S.C. § 3553(c) 28

18 U.S.C. § 3624(b) 23

Page(s)

18 U.S.C. § 3661 4

18 U.S.C. § 3742 4

18 U.S.C. § 3583 25

18 U.S.C. § 4161 (repealed) 23

18 U.S.C. § 4205 23

21 U.S.C. § 850 4

28 U.S.C. § 991(a) 18

28 U.S.C. § 994(a)(1) 14

28 U.S.C. § 994(b)(2) 14

28 U.S.C. § 994(p) 11, 12, 18

28 U.S.C. § 994(w) 19

FED. R. EVID. 1101(d)(3) 4

H.R. REP. NO. 96-1396 (1980) 11

Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act, Pub. L. No. 108-21, § 401, 117 Stat. 650 (2003) 12, 18, 21

Pub. L. No. 98-473, § 235, 98 Stat. 1837 (1984) 23

Pub. L. No. 100-690, § 6453, 102 Stat. 4181 (1988) 12

Page(s)

Pub. L. No. 104-38, § 1, 109 Stat. 334 (1995) 13

U.S.S.G. § 1A1.1 12

U.S.S.G. § 1B1.1 3

U.S.S.G. § 1B1.3 2

U.S.S.G. § 1B1.3(a)(2) 3

U.S.S.G. § 2D1.1(a)(3) 3, 5

U.S.S.G. § 3B1.1 5

U.S.S.G. § 3C1.1 5

U.S.S.G. § 5K2.0 ..... 4, 19, 20, 21

U.S.S.G. § 6A1.3 4

Wash. Rev. Code Ann. § 9.94A.120 19

Books, Articles, and Reports:

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Br. for the United States as *Amicus Curiae* Supporting Respondents, *Blakely* v. *Washington*, No. 02-1632 10

Page(s)

Br. for the United States in Opposition to Petition for Writ of Certiorari, *Ruggiano* v. *United States*, No. 88-367 25

Frank Bowman, III, *Train Wreck? A Plea for Rapid Reversal of* Blakely *v.* Washington 41 AM. CRIM. L. REV. ___ (forthcoming) 24

Stephen G. Breyer, *The Federal Sentencing Guidelines and the Key Compromises on Which They Rest*, 17 HOFSTRA L. REV. 1 (1998) 2, 3, 23

William Genego, Peter Goldberger & Vicki C. Jackson, *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810 (1975) 25

Julie O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real Offense System*, 91 NW. U. L. REV. 1342 (1997) 2

David Klein & Robert Hume, *Fear of Reversal as an Explanation of Lower Court Compliance*, 37 LAW & SOC'Y REV. 579 (2003) 30

DAVID MCCULLOUGH, JOHN ADAMS (2001) 29

Marc Miller, *Domination and Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211 (2004) 22

Page(s)

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KATE STITH & JOSÉ CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998) 28

Kate Stith & José Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247 (1997) 15, 21, 27

Kate Stith & Steve Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993) 4, 11

MICHAEL TONRY, SENTENCING MATTERS (1996) .. 8, 27, 28

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GARRY WILLS, INVENTING AMERICA (1979) 29

Page(s)

David Zlotnick, *The War Within The War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211 (2004) 18, 22

INTEREST OF *AMICUS CURIAE*[1]

Families Against Mandatory Minimums (FAMM) is a non-profit, nonpartisan organization dedicated to research, advocacy, and education of the public regarding the excessive social costs of mandatory minimum sentencing. Founded in 1991, FAMM has 30 chapters and 35,000 members nationwide. FAMM conducts sentencing workshops for its members, publishes a newsletter, maintains an extensive web site, serves as a sentencing clearinghouse for the media, and researches sentencing cases for *pro bono* litigation.

FAMM believes that punishment should be proportionate to the crime and the offender's culpability. FAMM opposes sentencing systems that rely on mandatory minimum statutes and mandatory sentencing rules. FAMM believes that such systems result in unduly harsh punishment while masking, and not adequately reducing, unwarranted sentencing disparities. Indeed, FAMM believes that such systems actually increase sentencing disparities in some respects.

FAMM supports non-binding federal guidelines that comply with the Sixth Amendment and ensure the procedural protections of the Fifth Amendment's Due Process Clause. Any such regime, in FAMM's view, must recognize the underlying importance of the jury's role, respect the historic sentencing discretion of Article III judges, incorporate effective standards of appellate review, and permit appropriate individualized treatment of criminal defendants while avoiding unwarranted sentencing disparities.

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[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation and submission of this brief.

STATEMENT

A. In *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), this Court invalidated a sentence imposed under Washington's Sentencing Reform Act. The Court held that the imposition of the sentence violated the defendant's Sixth Amendment right to a jury trial because it was predicated on a factual finding made by the judge rather than by the jury. In so holding, the Court applied the rule articulated in *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000), that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Blakely*, 124 S. Ct. at 2536. The Court made clear that the "statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Id.* at 2537 (emphasis in original).

B. Under the United States Sentencing Guidelines ("Guidelines" or "U.S.S.G."), a sentencing range may be determined primarily based on facts found by the sentencing judge alone. See Julie O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real Offense System*, 91 NW. U. L. REV. 1342, 1354 (1997). A sentencing range results from determining where, on a grid, a so-called "offense level" intersects with a defendant's criminal history category. Starting from a "base offense level" (derived at least in part from the offense of conviction), an adjusted offense level is calculated based on various judicial findings of fact, "many of which may require the consideration of nonconviction offense conduct." *Id.* at 1355; see Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises on Which They Rest*, 17 HOFSTRA L. REV. 1, 6 (1998).

The concept of "relevant conduct"—defined in U.S.S.G. § 1B1.3—underlies nearly all sentencing under the Guidelines. "Relevant conduct" includes conduct not proven to a jury or admitted by a defendant that the sentencing judge determines to

have been "part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a)(2). In cases like the ones before the Court, "relevant conduct" includes drug quantities. Those are aggregated under § 2D1.1(a)(3) to determine the base offense level—which increases as the drug quantity increases.[2]

Chapters Two and Three of the Guidelines Manual contain numerous other provisions under which a defendant's offense level may be increased based upon facts found by the sentencing judge. *E.g.*, U.S.S.G. § 2K2.1(c)(2) (providing that cross-reference to homicide guidelines (§ 2A1) applies at sentencing for firearm possession if "death resulted" from possession); *id.* § 3C1.1 (upward adjustment if the defendant obstructed justice). See generally U.S.S.G. § 1B1.1; Breyer, *supra*, 17 HOFSTRA L. REV. at 6-7. The end result of these calculations may subject a defendant to a sentence dramatically exceeding the sentence that he would be eligible to receive based solely on the jury's verdict or the defendant's admissions at a guilty-plea hearing. See, *e.g.*, *United States* v. *Washington*, 11 F.3d 1510, 1515 (10th Cir. 1993) ("relevant conduct increased defendant's sentencing range from 210-262 months (taking into account upward adjustments for role in the offense and obstruction of justice) to life imprisonment").[3]

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[2] Drug cases provide only one example of the "relevant conduct" principle in application. In economic crime cases, for instance, the base offense level is derived solely from the offense of conviction, but the "actual or intended loss" amount—which may be rather crudely estimated by the sentencing judge alone—is based upon "relevant conduct" and largely determines a sentence under § 2B1.1 as a "specific offense characteristic." See, *e.g.*, *United States* v. *Frank*, 354 F.3d 910, 927 (8th Cir. 2004) (affirming calculation of 12-offense-level increase based upon estimate of "intended pecuniary harm" that the district court characterized as a "reasonabl[e] and conservative[] guess").

[3] The burdens of proof that the lower courts have applied to judicial fact-finding under the Guidelines (with rare exceptions) resemble standards that govern civil cases. See, *e.g.*, *United States* v. *Lombard*, 102 F.3d 1 (1st Cir. 1996) (due process did not require sentencing court to apply any higher

Once the sentencing court determines the applicable guideline range, it must impose a sentence within that range "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the [United States Sentencing Commission ('Commission')] in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b); see U.S.S.G. § 5K2.0. The Guidelines are thus "binding on federal courts." *Stinson* v. *United States*, 508 U.S. 36, 42 (1993). "A judge who disregards them will be reversed." *Mistretta* v. *United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting). In that regard, a detailed scheme of appellate review governs sentencing under the Guidelines. See 18 U.S.C. §§ 3742(a)(3), 3742(b)(3) (either party may appeal a sentence imposed outside the applicable guideline range); accord Kate Stith & Steve Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 270 (1993) (noting how the appellate review provisions of the Sentencing Reform Act of 1984 expanded the category of illegal sentences from those that exceeded the statutory maximum to those "imposed in violation of duly promulgated regulations of the Commission"). Under the Guidelines, therefore, the maximum penalty authorized by the statute underlying the conviction is a maximum penalty "only in a formal sense," because the jury's verdict alone (or a defendant's admission) does not authorize the judge to impose a sentence at that level. *Ring* v. *Arizona*, 536 U.S. 584, 604 (2002).

The present cases are two examples, among innumerable others, of ones in which a Guidelines sentence was enhanced based on evidence of drug quantity calculated under

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standard of proof than preponderance of the evidence to find that defendant convicted of possessing a gun had used it to commit uncharged murders, for which he had been acquitted in state court, resulting in a sentence enhancement from a range of 20-30 years to life imprisonment); *Washington*, 11 F.3d at 1516. The Federal Rules of Evidence (except with respect to privileges) do not apply to sentencing proceedings. See 18 U.S.C. § 3661; 21 U.S.C. § 850; FED. R. EVID. 1101(d)(3); see also U.S.S.G. § 6A1.3.

§ 2D1.1(a)(3) that was not tested at a jury trial or in a guilty-plea proceeding under FED. R. CRIM. P. 11. Moreover, in respondent Booker's case, the district court adjusted the offense level—and thereby enhanced the sentence further—based on its finding that the defendant obstructed justice during his trial testimony. See 04-104 Pet. App. 1a-2a (applying U.S.S.G. § 3C1.1). Similarly, in respondent Fanfan's case, the district court indicated that, but for *Blakely*, it would have found that respondent played an "aggravating role" in the offense under U.S.S.G. § 3B1.1. 04-105 Pet. App. 2a. In short, the government in respondent Booker's case obtained, and in respondent Fanfan's case sought, a sentence that could have been imposed only based on judicial factfinding that went beyond the facts found by the jury or admitted by the defendant.

SUMMARY OF THE ARGUMENT

I. Although Congress may define a range of jury-authorized punishment for any crime, *Blakely* makes clear that where—by application of binding sentencing rules—the jury verdict legally authorizes only a particular amount of punishment, no sentence above that amount may be imposed based on facts found only by a judge. In this respect, the Guidelines are constitutionally indistinguishable from the sentencing provisions at issue in *Blakely*. Like the Washington scheme, the Guidelines allow (and indeed require) judicial factfinding as a predicate for a sentence beyond what would be permitted solely as a result of the jury's verdict (or defendant's admission). The Sixth Amendment forbids such a practice.

The Sentencing Commission's status as a nominally independent administrative agency in the Judicial Branch does not distinguish the cases now before the Court from *Blakely*. There is no indication in *Blakely* that the Sixth Amendment inquiry is controlled by whether sentencing rules are made directly by the legislature or by an agency that the legislature has established and whose pronouncements the legislature has made binding. Even if *Blakely* applies only to legislative acts, moreover, it still controls the cases now before the Court. As the enabling legis-

lation and more than 15 years of practice have shown, the Commission's pronouncements are legislative in character. Whatever independence the Commission nominally had when it was established has been undermined steadily by congressional action. The Commission has been transformed from an entity that was supposed to channel the knowledge of judges and experts into one that frequently serves to channel nothing more than the demands of Congress.

The government attempts to defend the Guidelines by arguing that applying *Blakely* would undermine a central premise of *Mistretta*: that the Sentencing Commission does not vest legislative responsibility in the Judicial Branch for "establishing the minimum and maximum penalties for every crime." 488 U.S. at 396. In *Mistretta*, the Court addressed whether the establishment of the Sentencing Commission violated the separation-of-powers doctrine by involving judges in legislative functions. The present cases and *Blakely*, however, address whether the Guidelines scheme violates the Sixth Amendment by assigning too much power to judges at the expense of juries. The government has conflated two distinct concepts. *Mistretta* addressed only the underlying maximum punishment that a legislature could set, whereas *Blakely* used the phrase "statutory maximum" as shorthand to identify the maximum punishment *authorized by a jury's verdict* (or a defendant's admission at a guilty-plea hearing). Thus, the government's suggestion notwithstanding, there is no reason to hesitate in applying the rule of *Apprendi* and *Blakely* to the Guidelines for fear of weakening *Mistretta*.

Although the government's *Mistretta* argument is miscast, 15 years of experience have brought into question certain assumptions made in *Mistretta*. There is now reason to believe that the reputation of the judiciary for impartiality and nonpartisanship *is* in fact being borrowed by the political branches to cloak their work in the "neutral colors of judicial action." 488 U.S. at 407. There is also now reason to believe that Congress no longer finds the "accumulated wisdom and experience of the Judicial Branch" meaningful in the creation of sentencing

policy. 488 U.S. at 412. Although the cases before the Court provide no occasion to overrule *Mistretta*, its foundations have begun to erode independently of *Blakely* and *Apprendi*.

Contrary to the argument of an ad hoc group of former federal judges in their brief as *amici curiae* in support of neither party ("*amici* Former Judges"), the existence of departure authority under 18 U.S.C. § 3553(b) does not convert a binding guideline system into a system of discretionary judicial sentencing. To impose a lawful sentence outside of an otherwise-applicable guideline range, a judge must find facts sufficient to justify the departure. Such factfinding raises precisely the Sixth Amendment concerns identified in *Blakely*. Moreover, to the extent that *amici* Former Judges are focusing on *downward* departure authority, many cases, including the ones now before the Court, involve facts permitting (or requiring) substantial penalty enhancements, but lack facts justifying the exercise of statutory downward departure authority. *Blakely* should be applied to the Guidelines, not limited or overruled, and the decisions below should be affirmed on the first question presented.

II. The government's non-severability argument is also flawed. The proposed remedy—remands for the district courts to exercise sentencing discretion within the underlying statutes' minimum and maximum terms, while treating the Guidelines as advisory—would have this Court endorse a sentencing system that Congress never intended. The Guidelines were not enacted as a free-standing piece of legislation; they were created as part of an interlocking scheme to reform the sentencing process. In particular, the creation of the Guidelines regime resulted in the abolition of parole, a dramatic reduction in the ability of prisoners to earn good-behavior credit, and the elimination of certain discretionary sentencing provisions. Neither system was intended to function piecemeal. Exposing defendants to sentencing discretion without guideline limits at the front end, and without a parole board's discretion at the back end, not only would be contrary to congressional intent; it would be unfair to criminal defendants. Given the choices available, defendants should be afforded lenity.

From a practical perspective, moreover, the government's proposed remedy raises more questions than it answers. The government says nothing about how the actual sentencing process, including the role of appellate review, would work if the current Guidelines were converted into mere suggestions. A better approach—which would, of course, require Congress's endorsement—would use non-binding guidelines promulgated by judges channeling their actual experience and expertise into advisory sentencing standards. Differential standards of appellate review would encourage judges to hew to the new guidelines and would give rise to a federal common law of sentencing for cases in which the guidelines were not followed. Properly structured and administered, such a non-binding system would be sensitive to differences among offenders, would trust and respect the historic roles of the jury and Article III judges, would control unwarranted sentencing disparities, and would ensure transparency in sentencing.

ARGUMENT

I. THE IMPOSITION OF AN ENHANCED SENTENCE UNDER THE GUIDELINES BASED ON FACTUAL DETERMINATIONS NOT AUTHORIZED BY A JURY'S VERDICT OR A DEFENDANT'S ADMISSION VIOLATES THE SIXTH AMENDMENT RIGHT TO TRIAL BY JURY

In *Blakely*, this Court held that the "statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." 124 S. Ct. at 2537 (emphasis omitted). Under the Guidelines' "modified real offense system," judges are permitted—indeed, required—to impose punishment based on facts not found by a jury or admitted by a defendant. See MICHAEL TONRY, SENTENCING MATTERS 93-95 (1996). The Guidelines are thus functionally and constitutionally indistinguishable from the sentencing regime invalidated in *Blakely*, and should meet with the same fate. See *Blakely*, 124 S. Ct. at 2549-50 (O'Connor, J., dissenting).

A. Under the Sixth Amendment (as opposed to, say, the Fifth Amendment's Due Process Clause or the Eighth Amendment), legislatures are virtually unconstrained in defining the scope of punishment authorized by a jury verdict (or its equivalent in the guilty-plea context). See *Blakely*, 124 S. Ct. at 2538 (noting that neither *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), nor *Williams* v. *New York*, 337 U.S. 241 (1949), "involved a sentence greater than what state law authorized on the basis of the verdict alone").[4] That is why, for example, a properly defined indeterminate sentencing scheme is not a "judicial impingement upon the traditional role of the jury"; the judicial factfinding under such a scheme does "not pertain to whether the defendant has a legal *right* to a lesser sentence." *Blakely*, 124 S. Ct. at 2540 (emphasis in original).

The Guidelines, in contrast, go beyond what the Sixth Amendment allows by replacing an indeterminate scheme that ultimately *was* grounded in the jury's authority with a determinate scheme that is *not* grounded in that authority. Whereas *Apprendi* ensures that "the judge's authority to sentence derives wholly from the jury's verdict," *Blakely*, 124 S. Ct. at 2539, the Guidelines permit, and often require, judges to enhance sentences based on myriad findings of fact on issues that need not be (and almost invariably are not) considered by the jury. These two approaches are incompatible, and the one created by Congress must yield to the one commanded by the Constitution.

B. The government makes three primary arguments that *Blakely* does not apply to the Guidelines. *Amici* Former Judges offer a different argument in support of that result. None of those defenses of the Guidelines is convincing.

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[4] FAMM believes that mandatory minimum sentences are properly subject to constitutional scrutiny, and that *Harris* v. *United States*, 536 U.S. 545 (2002), and *McMillan* were wrongly decided. *See Harris*, 536 U.S. at 572 (Thomas, J., dissenting) (stating that *McMillan* conflicts with *Apprendi*). FAMM recognizes that the constitutionality of mandatory minimum sentences is not a question presented in the cases now before the Court and does not address that issue in this brief.

1. The government asserts that *Blakely* does not apply because the Guidelines are the administrative product of the Commission, which is "not a legislature but an independent commission in the judicial branch." Br. for the United States ("U.S. Br.") 20. The government suggests that the jury-trial right "applies only to those facts that increase a sentence beyond what the *legislature* has found to be warranted by the elements specified in the statute." *Id.* at 26. That formulation, however, simply begs the question. The government supplies no reason why the Sixth Amendment should not apply to facts that increase a sentence above the maximum that is *legally authorized* in the absence of those facts, whether that maximum was imposed by the legislature itself or by a Commission exercising authority conferred on it by Congress.

a. In the first place, there is no indication in *Blakely* that the Guidelines may be salvageable on the ground that they are promulgated by a nominally independent sentencing commission instead of by Congress directly. See 124 S. Ct. at 2549 (O'Connor, J., dissenting) ("The fact that the Federal Sentencing Guidelines are promulgated by an administrative agency nominally located in the Judicial Branch is irrelevant to the majority's reasoning."). As Judge Posner observed for the majority below, the "Commission is exercising power delegated to it by Congress, and if a legislature cannot evade what the Supreme Court deems the commands of the Constitution by a multistage sentencing scheme neither, it seems plain, can a regulatory agency." 04-104 Pet. App. 4a.[5] The right to trial by jury is secured to the people by Article III and the Sixth Amendment against encroachment by the *state*—not any particular branch of government. What matters for constitutional purposes is not whether sentencing guidelines are promulgated by a legislature directly or by a sentencing commission exercising delegated power, but instead whether those guidelines are binding and permit judges to impose sentences not authorized by a jury's verdict or a defendant's admission.

[5] Indeed, the government itself observed in *Blakely* that "it is not entirely clear that the administrative nature of the Guidelines will insulate them from *Apprendi*." Br. for the United States as *Amicus Curiae* Supporting Respondent at 30, *Blakely* v. *Washington*, No. 02-1632.

b. Even if the promulgating source of the Guidelines were somehow material, the design and actual operation of the Sentencing Commission show that the Guidelines are legislative in nature. Although nominally located in the Judicial Branch, "the Commission is not a court, does not exercise judicial power, and is not controlled by or accountable to members of the Judicial Branch." *Mistretta*, 488 U.S. at 393. The Commission is instead "fully accountable to Congress," *ibid.*, which is entitled to review the Guidelines before they take effect and modify or reject them as it sees fit. See 28 U.S.C. § 994(p).[6]

Moreover, although the rulemaking in which the Commission engages may not involve the enactment of statutes, it is legislative in every other meaningful sense. The Guidelines—along with the statutory provisions that make them binding and provide appellate review of sentencing determinations—are legislative pronouncements that create entitlements to a certain range of sentences in particular factual circumstances. See Stith & Koh, *supra*, 28 WAKE FOREST L. REV. at 270 (in enacting the appellate review provisions of the Sentencing Reform Act, Congress acknowledged "the Commission's power to make new law restricting sentencing authority"). This Court has recognized that the Guidelines "are the equivalent of legislative rules." *Stinson*, 508 U.S. at 45. That is why, as the government concedes, changes in the Guidelines are subject to the Ex Post Facto Clause, which does

[6] Before passing the Sentencing Reform Act, Congress considered a guidelines regime that would have "'assign[ed] the task of developing guidelines to the Judicial Conference." Stith & Koh, *supra*, 28 WAKE FOREST L. REV. at 236 (quoting H.R. REP. NO. 96-1396 471, 484 (1980) (remarks of Representative Rodino)). That approach was rejected in favor of a bill similar to what was enacted as the Sentencing Reform Act of 1984.

not apply to judicial decisionmaking. U.S. Br. 24-25; cf. *Garner* v. *Jones*, 529 U.S. 244, 258 (2000) (Scalia, J., concurring).[7]

The legislative nature of the Guidelines has been confirmed and further underlined by more than 15 years of experience. Over the years, Congress has dictated its will to the Sentencing Commission on many occasions. Beginning soon after *Mistretta* was argued, and with increasing frequency later, Congress has directed the Sentencing Commission to amend the Guidelines, in specified ways, more than 50 times.[8] In 2003, Congress directly enacted new guidelines itself, cutting the Commission out of the process altogether. See PROTECT Act § 401(i). The PROTECT Act arrived not long after the Department of Justice took the position that "we believe the sentencing commission exists to effectuate the express will of Congress." United States Sentencing Commission, 2002 Public Hearing (Mar. 19, 2002) (testimony of then-Deputy Attorney General Larry D. Thompson). As two commentators have observed, these developments have effectively turned the Commission into "an empty shell, or the equivalent of a congressional committee staff." Jeffrey Parker & Michael Block, *The Limits of Federal Sentencing Policy, or Confessions of Two Reformed Reformers*, 9 GEO. MASON L. REV. 1001, 1022 & n.97 (2001) (noting that one of the Commission's primary tasks in the 1990s has been responding to congressional legislation).[9]

[7] The ordinary rules of administrative review do not even apply to the Commission. Although the Commission is required to use notice-and-comment procedures for guideline amendments, its rulemaking is not otherwise subject "to any other provision of the APA, including those for judicial review." *United States* v. *Lopez*, 938 F.2d 1293, 1297 (D.C. Cir. 1991).

[8] The first congressional directive to the Sentencing Commission was issued on November 18, 1988, approximately six weeks after *Mistretta* was argued, in Pub. L. No. 100-690, § 6453, 102 Stat. 4181, 4382 (1988). See 28 U.S.C. § 994 note; U.S.S.G., App. C, amend. 134. Before passage of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act, Pub. L. No. 108-21 (2003), the Guidelines Manual identified 28 U.S.C. § 994(a)—part of the enabling legislation establishing the Commission—as the source of its amendment authority. See, *e.g.*, United States Sentencing Commission, *Guidelines Manual* (Nov. 2002 ed.). After the PROTECT Act, the Commission amended Chapter One of the Guidelines Manual to state that ongoing congressional directives constitute a source of amendment authority independent of 28 U.S.C. § 994(a). U.S.S.G. § 1A1.1 (Nov. 2003 ed.).

Against this backdrop, the Commission's nominal independence cannot insulate the Guidelines regime from *Blakely*'s reach. There is no plausible reason why a guideline range enacted directly by Congress should be treated any differently—for Sixth Amendment purposes—from one that Congress orders the Commission to enact, or one that the Commission enacts with tacit congressional approval. By virtue of 18 U.S.C. § 3553(b), each has the same effect on the sentencing court and on the ultimate sentence that lawfully may be imposed on the defendant. In short, a guidelines scheme in which the legislature is as intimately involved as it is in the current federal regime cannot be distinguished from the Washington sentencing provisions, except through an elevation of form over substance, which this Court's Sixth Amendment cases have consistently rejected. See *Ring*, 536 U.S. at 604 ("the relevant inquiry is one not of form, but of effect") (quoting *Apprendi*, 530 U.S. at 494).

c. Even under a more formalistic approach that insists on direct legislative action to trigger the application of the Sixth Amendment, cf. 04-104 Pet. App. 21a-23a (Easterbrook, J., dissenting), *Blakely*'s reasoning would still apply to the Guide-

[9] Congress affirmatively has rejected the Commission's expert recommendations as well. In 1995, the Commission proposed amendments designed to address the dramatic penalty disparities between offenses involving what is commonly known as crack cocaine and powder cocaine. Congress disapproved those amendments. See Pub. L. No. 104-38, § 1, 109 Stat. 334 (1995). The Commission subsequently has issued reports for congressional consideration setting forth alternatives to the statutory penalty scheme concerning those drugs, but Congress has not acted on them. See United States Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy*, Executive Summary at v (May 2002) (available at http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm).

lines. By statute, Congress directed the Commission to establish "guidelines * * * for use of a sentencing court in determining the sentence to be imposed in a criminal case." 28 U.S.C. § 994(a)(1). By statute, those guidelines must "establish a sentencing range," *id.* § 994(b)(1), which must be capped such that the maximum "shall not exceed the minimum of that range by the greater of 25 percent or 6 months," *id.* § 994(b)(2). Capped ranges are what forbid judges from sentencing defendants to the maximum penalty authorized by the statute underlying the conviction without engaging in factfinding beyond facts found by the jury. And such ranges are binding on courts only because Congress made them so in 18 U.S.C. § 3553(b) and ensured in § 3742 that unauthorized departures will be reversed on appeal. Although Congress left the details to the Commission, the core architecture of the Guidelines system—including those features that render the system most problematic under the Sixth Amendment—is contained in the Sentencing Reform Act and subsequent Acts. If statutes are indeed required to trigger *Blakely*'s application, therefore, the Guidelines are sufficiently creatures of statute to fall within *Blakely*'s sway.

2. The government next tries to distinguish the Washington sentencing regime on the ground that it—unlike the Guidelines—created "grades of statutory offenses" analogous to "federal statutes that set three different maximum penalties for an offense depending on the presence or absence of certain aggravating facts." U.S. Br. 26-27; see, *e.g.*, *Jones* v. *United States*, 526 U.S. 227 (1999). This purported distinction fundamentally misconstrues the Washington scheme.

Unlike the federal statutes to which the government tries to analogize, Washington's sentencing scheme does not make the increased penalty turn on some specific fact that the legislature has deemed relevant. Instead, it makes the departure turn on "*any* aggravating fact," without attempting to catalogue exhaustively the types of findings that would justify an enhanced sentence. *Blakely*, 124 S. Ct. at 2538. Despite the government's suggestion, therefore, the factual findings relevant in Washington are *not* "limited" in number (U.S. Br. 27) and do *not*

"'divide crimes into narrow degrees and standard categories,'" *id.* at 28 (quoting *United States* v. *Emmenegger*, No. 04-CR-334, 2004 WL 1752599, at *16 (S.D.N.Y. Aug. 4, 2004)). What is more, the Washington scheme specifically *prohibits* "reliance by sentencing courts upon facts that would constitute the elements of a different or aggravated offense." *Blakely*, 124 S. Ct. at 2550 (O'Connor, J., dissenting) (quoting Wash. Rev. Code. Ann. § 9.94A370(2)). In other words, the one factual finding that Washington courts may *not* rely on to enhance a sentence beyond the otherwise-applicable maximum is one that would effectively create a stepped-up grade of statutory offense.

To be sure, the Guidelines are based on a modified "real offense" system of punishment, and they include concepts, such as "relevant conduct," that do not fit into standard classifications of offense elements. The kinds of factual findings that Washington judges made to sentence beyond the standard range tended to be less specific and more open-ended than are many of the specific factual findings on which federal Guidelines enhancements are based. Cf. Kate Stith & José Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1254 (1997) ("Each step of a sentencing calculation under the Guidelines represents what mathematicians call a 'minimal pair': The judge must decide whether a given factor deemed relevant by the Sentencing Commission is present or absent in the case at hand."). But that type of distinction, as the Court specifically concluded in *Blakely*, is "immaterial" for Sixth Amendment purposes, 124 S. Ct. at 2538, and thus provides no basis for distinguishing the Guidelines from their Washington counterparts.[10]

3. The government, in its effort to defend the Guidelines, goes so far as to assert that applying *Blakely* would "undermine

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[10] If anything, the "soft constraints" employed by the Washington system are more constitutionally defensible than are the "hard constraints" of the Guidelines, which call for factual findings that would be relatively easy for juries to make. *Blakely*, 124 S. Ct. at 2550 (O'Connor, J., dissenting).

one of the central premises of *Mistretta*: that the Sentencing Commission does not vest in the Judicial Branch the legislative responsibility for 'establishing the minimum and maximum penalties for every crime.'" U.S. Br. 38 (quoting *Mistretta*, 488 U.S. at 396); *id.* at 63-66. That argument ignores crucial distinctions between *Mistretta,* on the one hand, and *Blakely* and the cases now before the Court, on the other.

a. In *Mistretta*, the Court addressed the argument that the establishment of the Sentencing Commission violated separation-of-powers principles by involving judges in functions that are the special responsibility of the Legislative Branch. In that context, the Court was concerned with the constitutional allocation of power between the Judicial and the Legislative Branches. Like *Blakely*, however, the cases before the Court address a very different problem: whether the Guidelines scheme assigns too much power to judges at the expense of juries in violation of the Sixth Amendment. See 124 S. Ct. at 2540 (the Sixth Amendment "limits judicial power *only* to the extent that the claimed judicial power infringes on the province of the jury"). *Mistretta*, of course, did not involve a Sixth Amendment challenge, and the Court thus had no occasion to consider whether the Guidelines create constitutional problems by usurping the role of the jury as a "circuitbreaker in the State's machinery of justice." *Id.* at 2539.

Given the different constitutional issues presented in the cases, there is no reason to believe that *Blakely*'s definition of "statutory maximum" as the most severe sentence that a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant, 124 S. Ct. at 2537, means the same thing as "maximum penalt[y] for [a] crime" as that phrase was used in *Mistretta*. The latter concept denotes the maximum sentence that a defendant may *possibly* receive for committing a particular crime; the former denotes the maximum sentence that a defendant may receive without further authorization by a jury. Under the existing federal sentencing scheme, these concepts are not the same.

The phrase "statutory maximum" appears to have been used in *Apprendi* because the question there involved purely legislative sentencing provisions. As *Blakely* implies, however, that phrase is best understood as a term of art identifying what is constitutionally permissible in the division of factfinding authority between judge and jury. To illustrate: the state statutory provisions at issue in *Blakely* did not make the maximum penalty for second-degree kidnapping with a firearm 53 months. Instead, 53 months was merely the maximum sentence that could be imposed without any additional judge-made findings. 124 S. Ct. at 2537. A defendant could be convicted of that crime and lawfully sentenced to 10 years so long as the additional findings were authorized by a jury. So it is here. The Sentencing Commission does not set the ultimate maximum possible penalty for every crime, but it surely *does* set penalties that a judge may exceed only by making further findings of fact without a jury's authorization. *Blakely* thus may be applied to the Guidelines, as its logic suggests that it must be, without weakening *Mistretta* or calling into doubt its dictum about the nature of the Commission's work.[11]

b. Although the government's *Mistretta* argument is miscast, 15 years of experience since *Mistretta* have brought into question certain other assumptions the Court made in that case. As described above, Congress frequently pays no attention to the Commission's nominal independence. For example, instead of letting the Commission produce amendments based on care-

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[11] Faced with *Blakely*'s clarity, the government ultimately retreats and asks this Court to reconsider the case. U.S. Br. 41. That argument boils down to a claim that it would be better to reconsider one case (*Blakely*) than to call into question four cases (*United States* v. *Dunnigan*, 507 U.S. 87 (1993); *Witte* v. *United States*, 515 U.S. 389 (1995); *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam); and *Edwards* v. *United States*, 523 U.S. 511 (1998)). U.S. Br. 41. But the Sixth Amendment issue in *Apprendi* and *Blakely* was not decided by the Court in *Dunnigan*, *Witte*, *Watts*, or *Edwards*. Each of those four cases would be subject to the rule of *Apprendi* and *Blakely* if decided today. And there is nothing ignoble about recognizing their supersession by a doctrine not addressed in any of them.

ful study, and then exercising its oversight responsibility under the review scheme set forth in the enabling legislation—see 28 U.S.C. § 994(p); *Mistretta*, 488 U.S. at 412 ("The Constitution's structural protections do not prohibit Congress from delegating to an expert body located within the Judicial Branch the intricate task of formulating sentencing guidelines")—Congress regularly dictates its immediate policy judgments to the Commission through specific directives and, in the case of the PROTECT Act, actual amendments to the Guidelines. See pp. 12-13 & n.8, *supra*. Those practices give rise to serious concerns that the judiciary's reputation for impartiality and nonpartisanship—which the Court in *Mistretta* decided was not brought into question by the legislation under review—*is* in fact being "borrowed by the political Branches to cloak their work in the neutral colors of judicial action." 488 U.S. at 407; see also Parker & Block, *supra*, 9 GEO. MASON L. REV. at 1024 ("this type of legislation obviously makes the Commission's job of systematic rationalization of sentences more difficult, and tends to reinforce a misconception of the Commission" as an agency that "exists to carry out the transitory political will").

Developments since *Mistretta* have also brought into question whether the Commission meaningfully "call[s] upon the accumulated wisdom and experience of the Judicial Branch in creating policy on a matter uniquely within the ken of judges." 488 U.S. at 412. Along with Congress's practice of dictating guideline amendments, Congress amended 28 U.S.C. § 991(a) to provide that the Commission may function by law without even a single judge as a member, thus making the Commission's already marginal connection to the Judicial Branch even more tenuous. See PROTECT Act § 401(n). That enactment in itself suggests that judicial wisdom and experience, from Congress's perspective, may have lost their luster when it comes to the formulation of sentencing policy. See David Zlotnick, *The War Within The War On Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211, 231-32 (2004) (the PROTECT Act illustrates "just how Congress has abandoned its original conception of the

Sentencing Commission"). Thus, although there is no occasion to reconsider *Mistretta* in the present cases, its foundations have begun to erode quite independently of *Apprendi* and *Blakely*.[12]

4. Like the government, *amici* Former Judges "urge this Court to uphold the constitutionality of the Guidelines." Judges' Br. 5. According to *amici* Former Judges, a sentencing judge's ability to depart from an otherwise-binding guideline range means that "the federal scheme does not implicate a defendant's right to have a jury decide facts that may increase a sentence pursuant to the holding announced in *Blakely*." Judges' Br. 6. That argument is flawed for at least two reasons.

First, the Washington system at issue in *Blakely* operated in all relevant respects much like the departure provisions of the Guidelines. See *Blakely*, 124 S. Ct. at 2549 (O'Connor, J., dissenting) (describing the two systems as "almost identical").[13]

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[12] The relationship between Congress and the Judicial Branch with respect to sentencing issues has suffered other strains. Recently, Congress required the Commission to gather judge-specific sentencing information and report statistics to Congress derived from that information. See 28 U.S.C. § 994(w). Enacted as part of the PROTECT Act, that provision has been the source of controversy. As Chief Justice Rehnquist noted, "it seems that the traditional interchange between the Congress and the Judiciary broke down when Congress enacted what is known as the PROTECT Act." 2003 Year-End Report on the Federal Judiciary (available at http://www.supremecourtus.gov/publicinfo/year-end/2003year-endreport.html).

[13] Both sche allow judges to go beyond the otherwise-applicable (and binding) sentencing range on findings of aggravating circumstances that make the particular case more severe than the usual case. In each case, the scheme provides only general criteria for when a departure may be justified. Compare Wash. Rev. Code. Ann. § 9.94A.120(2) ("substantial and compelling reasons justifying an exceptional sentence") with U.S.S.G. § 5K2.0(a)(1)(B) (existence of "an aggravating circumstance, of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that * * * should result in a sentence different from that described"). Both schemes require judges to make factual findings and set forth their reasons for departing. Compare Wash. Rev. Code. Ann. § 9.94A.120(3) with U.S.S.G. § 5K2.0(e). It is thus no accident

Under the Guidelines, an upward departure from an otherwise-applicable guideline range, just like an enhancement based on "relevant conduct," derives from factual findings not made by a jury or admitted by a defendant. See *Koon* v. *United States*, 518 U.S. 81, 99-100 (1996) (describing the considerations that go into the departure decision as "factual matters"). Even when exercising departure authority, therefore, a judge may impose a sentence beyond the maximum authorized by the jury's verdict (or a defendant's admission) only by making additional findings of fact. The existence of that authority thus in no way distinguishes the Guidelines regime from the regime at issue in *Blakely*. See 124 S. Ct. at 2537 ("[T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.").

Second, insofar as the Former Judges contend that a sentencing court's ability to depart *downward* distinguishes the Guidelines from the scheme at issue in *Blakely*, they ignore the reality that in many (if not most) cases a factual basis for a departure from the applicable guideline range is simply not available. Indeed, a court's theoretical downward-departure authority under 18 U.S.C. § 3553(b) has no bearing on the application of the Sixth Amendment to a particular case in which (1) an enhanced sentence is based on facts not found by the jury or admitted by the defendant; and (2) no basis for the exercise of downward departure authority under § 3553(b) exists. The two cases before the Court appear to meet both of those criteria.

A sentencing court's ability to depart from an otherwise-applicable guideline range is closely circumscribed. "In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." 18 U.S.C. §3553(b); see also U.S.S.G. § 5K2.0. This Court's decision in *Koon*—holding that judges

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that the Court in *Blakely* used the term "departure" to describe the "deliberate cruelty" enhancement at issue in that case. 124 S. Ct. at 2535.

may depart in cases outside the "heartland" of the Guidelines; that departures should be reviewed by appellate courts under an abuse-of-discretion standard; and that departure decisions "will in most cases be due substantial deference" (518 U.S. at 98)—did not (and could not) affect the core restrictions imposed by § 3553(b). "In the wake of *Koon*, as before *Koon*, the main question on appeal of a departure continues to be whether the Sentencing Commission had already taken into account the circumstances that the sentencing judge has identified as warranting departure in the particular case." Stith & Cabranes, *supra*, 91 NW. U. L. REV. at 1280. "As it happens, the Sentencing Commission has already considered, and the Sentencing Guidelines have already factored in, many if not all circumstances that are arguably relevant to criminal sentencing; this micro-management is one of the Guidelines' most notable features." *Ibid.*[14]

Given the strictures and the sweep of 18 U.S.C. §3553(b), the Former Judges err in asserting that invariably the Guidelines "do not compel a sentencing judge to impose the Guidelines-determined sentence." Judges' Br. 14. The Guidelines often *do* have that precise effect—as was their aim—both in Circuits with relatively low departure rates and in Circuits with relatively high departure rates. The departure provisions, as written and as applied, give judges insufficient discretion to alleviate the Sixth Amendment concerns raised by applications of the Guidelines.[15] Thus, while FAMM agrees that "the

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[14] The PROTECT Act abrogated *Koon* in part by mandating a *de novo* appellate standard of review for certain core components of departure decisions. PROTECT Act § 401(d)(2).

[15] The insufficiency of theoretical possibilities for departure as a basis on which to distinguish the Guidelines regime from the scheme in *Blakely* is even more apparent after the PROTECT Act. As the Former Judges recognize, that Act "reduced the discretion of district court judges by limiting the availability of combination-of-factors departures [under USSG § 5K2.0]" and by dictating the boundaries of potential departures in certain cases involving sexual offenses against children. Former Judges' Br. 18 n.2. But the PRO-

principal goal of any sentencing scheme should be to do justice to each individual who comes before the bar of justice," Judges' Br. 24, the current Guidelines fall well short of that goal. As applied under the Sentencing Reform Act, they are also unconstitutional.

II. THE GOVERNMENT'S PROPOSED REMEDY WOULD REQUIRE THE COURT TO ENDORSE A SENTENCING SYSTEM THAT CONGRESS DID NOT INTEND, WOULD BE UNFAIR IN ITS APPLICATION, AND IS IMPRACTICABLE

If the Court follows through on *Blakely*'s logic and applies its reasoning to the Guidelines, it is all but inevitable that a new sentencing regime will have to be devised to fill the place once occupied by the Guidelines. To that end, the government suggests that the existing Guidelines "must rise or fall as a whole" if *Blakely* is held to apply (U.S. Br. 66) and that the Guidelines in that event should continue to be used, pending congressional action, as a set of purely advisory recommendations. *Id.* at 44, 69. Both parts of that proposal are flawed.

A. The government's non-severability argument and its proposed remedy are geared toward staving off truncated applications of the Guidelines and jury determinations of facts made relevant by the Guidelines. U.S. Br. 49-63. The primary problem with the government's proposal is that it would create—in the name of effectuating Congress's intent—a

TECT Act did much more. In addition to abrogating *Koon* as to the applicable standard of review in some respects, it also "forbade the Sentencing Commission from adding any new departure grounds for two years, instructed the Sentencing Commission to amend the guidelines and policy statements to substantially reduce the incidence of downward departures, and lastly, directed the Department of Justice to assist in this endeavor." Zlotnick, *supra*, 57 SMU L. REV. at 236 (citing PROTECT Act § 401). The PROTECT Act thus represents a transparent effort by Congress to minimize the frequency of departures from Guideline-mandated sentencing ranges. See Marc Miller, *Domination and Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1241-51 (2004) ("It is hard * * * to see the PROTECT Act as anything less than a foundational realignment of the federal sentencing system.").

sentencing regime never contemplated by Congress. The Guidelines are not a free-standing piece of legislation, but were developed over several years as an integral component of comprehensive federal sentencing reform. The Sentencing Reform Act of 1984 effected a host of substantive changes in the sentencing process, including new provisions for incarceration, supervised release, probation, fines, and forfeitures. See Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83, 84 (1988). In addition, the Act abolished parole in the federal system, mandating that prisoners should serve the full length of their sentences, with only the possibility of a 15-percent reduction for good behavior. Compare 18 U.S.C. § 3624(b) with 18 U.S.C. § 4161 (repealed). It also eliminated an oft-used provision of the Federal Rules allowing judges to reconsider their sentences, on a discretionary basis, within 120 days after the sentence became final. FED. R. CRIM. P. 35(b) (former version). Yet Congress decreed that none of these provisions would take effect until the effective date of the Guidelines. See Pub. L. No. 98-473, § 235, 98 Stat. 1837 (1984).[16]

Congress had two overriding goals in enacting comprehensive sentencing reform: (1) controlling sentencing disparities by reducing judicial discretion in imposing sentences; and (2) creating "truth in sentencing" by reducing executive discretion to release prisoners before the end of their sentences. Breyer, *supra*, 17 HOFSTRA L. REV. at 4-5. The former goal underlay the establishment of the Sentencing Commission and the Guidelines; the latter led to the abolition of parole and the limits on good-time credits. *Ibid.* These reforms worked in tandem: the Guidelines addressed the front end of the sentencing process; the abolition of parole addressed the back end. Together, they were designed to transform federal sentencing from a process built on individualized discretion to one built on standardized rules of general applicability, and neither was in-

[16] The basic statute governing parole eligibility, 18 U.S.C. § 4205, was repealed effective November 1, 1987, when the Guidelines became effective.

tended to stand alone. See Frank Bowman, III, *Train Wreck? A Plea for Rapid Reversal of* Blakely *v.* Washington, 41 AM. CRIM. L. REV. ___ (forthcoming) (typescript at 29) ("The congressional decision to eliminate regularized back-end release authority and substitute determinate sentences and supervised release can only be understood in the context of the simultaneous implementation of sentencing guidelines for district judges and appellate review of guidelines sentencing decisions, which were designed to operate together to drastically reduce front-end inter-judge sentencing disparities.").

The government cites the rule that "'[t]he inquiry into whether a statute is severable is essentially an inquiry into legislative intent.'" U.S. Br. 44 (quoting *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999)). But that very rule undermines the proposal that the government asks this Court to adopt. Congress did not intend to create a sentencing system in which judges exercise virtually unfettered discretion at the front end to impose sentences anywhere between the underlying statutory minimum and maximum, but in which there is no mechanism to reduce the effects of sentencing disparities at the back end. As Professor Alschuler puts it, "instituting a system of judicial sentencing discretion without the check provided by the Parole Commission would not resurrect the pre-Guidelines regime. It would instead create a sentencing system unlike any that has previously existed in the federal courts." Albert W. Alschuler, *To Sever or Not to Sever? Why Blakely Requires Action By Congress*, 17 FED. SENT. RPTR. __ (forthcoming Oct. 2004) (available at http://sentencing.typepad.com/sentencing_law_and_policy/2004/08/professor_alsch.html).

The logic of the government's own severability analysis thus would require a total return to the pre-Guidelines system. The question as framed by the government is not whether certain aspects of the Guidelines are severable from other aspects but whether the unconstitutional aspects of the Sentencing Reform Act and its implementing rules (including the Guidelines) may be severed from the rest of the statutory structure. Should

one pillar of the integrated reform package devised by Congress be eliminated, consistency and respect for legislative design demands that the others be removed as well.[17]

A severability analysis that stops at the Guidelines is not just illogical. Fundamental fairness also forbids such a limit. The government endorses a result that would expose defendants to greater sentencing risk than they would have borne under any sentencing regime that actually has ever existed. They would face virtually unchecked judicial discretion, as in the pre-Guidelines system, but would be forced to serve their sentences without the opportunity for discretionary sentence reductions, broad good-behavior provisions, and recourse to a parole commission that was integral in mitigating the sometimes harsh consequences of a judge's sentencing discretion. See William Genego, Peter Goldberger, & Vicki C. Jackson, *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810, 823 (1975). Moreover, although the government says nothing about it, the supervised release provisions codified in 18 U.S.C. § 3583, if left in place without binding Guidelines, would impose a still further restraint on liberty in a way never imagined by Congress.

Therefore, if the choice (pending possible congressional action) is either a truncated guideline system or the system advocated by the government, the Court should opt for the former. There is no reason why defendants sentenced without the constraints of the Guidelines should lack the protections of the system that the Guidelines made obsolete. Adopting the government's artificially constrained severability analysis would create a regime no more legislatively authorized—and significant-

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[17] The government once recognized this point. In a brief filed when *Mistretta* was pending decision, the Solicitor General observed that "[i]f the Court should strike down the sentencing guidelines established by the Sentencing Reform Act in *United States* v. *Mistretta*, * * * it may also conclude that other provisions of the Act are not severable, including the provisions repealing Section 4205." Br. for the United States in Opposition to Petition for Writ of Certiorari, *Ruggiano* v. *United States*, No. 88-367.

ly less fair to criminal defendants—than one in which only the unconstitutional features of the Guidelines are struck down, or one in which the Guidelines are applied based on factfinding by juries rather than judges. In a world of second-bests, the defendant should be afforded lenity.

B. The government's proposed remedy—transforming the current Guidelines into a set of non-binding sentencing recommendations—is also impracticable. Although advisory guidelines are a constitutionally acceptable alternative to the present regime (and properly designed, a desirable one), a true *Blakely*-compliant system of advisory guidelines must be built from the ground up. The government, apparently, would have them emerge from what is left of the Guidelines, through a Sentencing Commission with an uncertain mandate.

1. Despite (or perhaps because of) its seeming simplicity, the government's proposal raises many more questions than it answers. The government does not address what the mechanics of sentencing would look like if the current Guidelines were transformed into mere suggestions. Would district court judges still be required to go through the complex procedures required under Guidelines sentencing? Would probation officers still write technical pre-sentence reports calculating a Guidelines sentence? What, if anything, would be the consequence if a judge chose to disregard either the procedures or the results of guideline recommendations? If a judge erred in calculating a non-binding guideline sentence (whether by making an unsupported factual finding or by misinterpreting some provision of the Guidelines) would the defendant or the government be able to appeal that mistake? Indeed, the government says nothing about the availability or scope of appellate review under its proposed remedy, or whether the exercise of sentencing discretion would be given "virtually unconditional deference on appeal," as was the case before the Sentencing Reform Act of 1984. *Mistretta*, 488 U.S. at 364.

Nor does the government address the Sentencing Commission's role in a world of advisory guidelines in which its

pronouncements likely would have virtually no legal significance. Would the Commission continue proposing and issuing guideline amendments? Would it have the authority to correct mistaken or conflicting interpretations of the Guidelines made by judges who attempted to hew their sentences to the advisory guidelines? See *Braxton* v. *United States*, 500 U.S. 344, 348 (1991) (noting that such clarification is an important service played by the Commission in ensuring sentencing uniformity).

Against this backdrop, it is rather ironic for the government to attack a remedy that would require jury determinations under the existing Guidelines on the ground that "there is ample reason to conclude that Congress and the Commission did not intend for the system to function in such a manner." U.S. Br. 59. Those objections, of course, apply equally well to a system in which the existing Guidelines are turned into nothing more than recommendations that courts are free to disregard at will.

A system that leaves the Guidelines in place without offering judges any incentives to pay attention to them creates the worst of all worlds. That approach would compromise the laudable goal of minimizing sentencing disparities while perpetuating the least desirable features of the Guidelines regime—its numbing complexity, procedural unfairness, and bureaucratization of the judicial function. See Stith & Cabranes, *supra*, 91 NW. U. L. REV. at 1263 (noting how the Guidelines make sentencing "dry, complicated, mechanistic, and frequently incomprehensible to courtroom observers, including the parties"); TONRY, *supra*, at 98 ("One of the commission's worst blunders was promulgation of the forty-three level sentencing grid * * * giving an appearance of arbitrary sentencing by numbers * * *."). The ruins of the existing Guidelines provide a most undesirable site on which to build a truly fair and effective set of advisory guidelines.

2. The better approach—ultimately, of course, one that would require Congress's endorsement—is to use non-binding guidelines as part of a new sentencing regime, one that trusts and respects the historic roles of the jury and Article III judges

and is sensitive to differences among offenders, while still controlling unwarranted sentencing disparities by creating incentives for judges to follow a uniform set of principles in formulating their sentences. In its broad outlines, such a system would look something like this:

First, it would have non-binding guidelines as its centerpiece with fewer severity levels. By making the calculation of sentencing ranges easier and less cumbersome, the system would reduce errors, and sentencing would become less rigid and machine-like. TONRY, *supra*, at 98-99. That, in turn, would increase transparency and give the new system greater legitimacy in the eyes of judges, defendants, and the public at large. Such respect is essential, particularly for non-binding guidelines. See *id.* at 98 (noting that judges who are alienated from an overly mechanical guidelines grip are "unlikely to invest great effort in protecting the integrity of the system").

Second, the guidelines should be promulgated by judges alone—perhaps by a body formed out of the Judicial Conference. Not only would this help minimize the political interference that has plagued the current Guidelines, but giving district judges more of an institutional stake in the guidelines would make them more likely to abide by those standards, even if they were not compelled to do so by law. Cf. KATE STITH & JOSÉ CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 174-75 (1998) (proposing a similar system). Many proponents of sentencing reform before 1984 advocated just such an approach. See Stith & Koh, *supra*, 28 WAKE FOREST L. REV. at 236; see also *supra* note 6.

Third, sentencing determinations under such a new regime would be subject to meaningful appellate review designed to control unwarranted sentencing disparities and create a common law of sentencing. All sentencing decisions would be justified by specific findings and conclusions, crystallized by a statement of reasons (cf. 18 U.S.C. § 3553(c)) and would be subject to appellate scrutiny. Judicial findings of fact would be made according to appropriately stringent burdens of proof.

Although judges would not be required to abide by the advisory guidelines, an additional incentive for them to do so would come in the form of differential standards of review depending on whether a sentence was imposed based on the guidelines. A sentence conforming to the guidelines would be appealable only on the ground that the court miscalculated the guideline range, whether by making a legal error about the applicability of a particular guideline or by making a factual error about some issue relevant to the guideline determination. A *de novo* standard of review would apply to legal and mixed questions; a clearly-erroneous standard would apply to findings of fact. But sentences within the range would otherwise be virtually unreviewable.

In contrast, a judge who chose to impose a sentence outside of the guideline range would be subject to more searching review on appeal. The sentence could be vacated unless the court of appeals was satisfied that it had been tailored carefully to meet both the criteria stated by the sentencing court judge and the basic principles of federal sentencing law—akin to those currently set out in 18 U.S.C. § 3553(a) (identifying factors critical to sentencing determinations, including the importance of a defendant's history and characteristics, the seriousness of the offense, the need to protect the public, the need to deter similar conduct, and needs of the defendant).[18]

Such a strict standard—and the increased chance of reversal that it would bring—would create a strong incentive for judges to follow the new guidelines in most cases. See generally David Klein & Robert Hume, *Fear of Reversal as an Explanation of Lower Court Compliance*, 37 LAW & SOC'Y REV. 579,

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[18] Paramount among these philosophical touchstones of sentencing is the principle of parsimony. As recognized in § 3553(a), but as first articulated in 1764 by Cesare Beccaria in time to influence Enlightenment thinkers like the Framers, punishment should always be "not greater than necessary." See GARRY WILLS, INVENTING AMERICA 94 (1979) (discussing impact of Beccaria on Jefferson); DAVID MCCULLOUGH, JOHN ADAMS 66-67 (2001) (discussing John Adams's use of Beccaria's ideas).

581-82 (2003). The result would be a system in which sentencing uniformity would be maximized without either compromising the ideal of individualized justice or running afoul of the Sixth Amendment. Finally, allowing appellate courts the opportunity to shape sentencing policy on a case-by-case basis would give rise to a common law of sentencing, which over time would help ensure increased consistency in sentencing even in cases where judges chose not to follow the guidelines. Cf. *Ornelas* v. *United States*, 517 U.S. 690, 697 (1996) (stating that reviewing reasonable suspicion and probable cause determinations *de novo* "tends to unify precedent" and comes closer to providing a set of standards that facilitate correct determinations in advance).

Properly structured and administered, such a system would result in a sentencing regime that the current Guidelines system promised but failed to deliver. Judges would actually have discretion in all cases to impose a sentence "sufficient, but not greater than necessary," to comply with the purposes of sentencing. See 18 U.S.C. § 3553(a). And the public, the government, and criminal defendants alike would actually have the benefit of "the accumulated wisdom and experience of the Judicial Branch in creating policy on a matter uniquely within the ken of judges." *Mistretta*, 488 U.S. at 412.

CONCLUSION

In No. 04-104, the judgment of the court of appeals should be affirmed. In No. 04-105, the judgment of the district court should be affirmed.

Respectfully submitted.

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SEPTEMBER 2004

(8) (7)

Nos. 04-104 & 04-105

Supreme Court, U.S.
FILED
SEP 9 - 2004
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

UNITED STATES OF AMERICA, *Petitioner*,

v.

FREDDIE J. BOOKER, *Respondent*,

UNITED STATES OF AMERICA, *Petitioner*

v.

DUCAN FANFAN, *Respondent*

On Writ of Certiorari to the United States Courts of Appeals for the First and Seventh Circuits

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BRIEF OF THE FEDERAL PUBLIC DEFENDER, NORTHERN DISTRICT OF TEXAS, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Other than the fact of a prior conviction, can a defendant's mere admission of facts function as a waiver of constitutional rights, which would then allow a court to use those facts to increase the sentence beyond the relevant statutory maximum sentence that the indictment supports?

TABLE OF CONTENTS

QUESTION PRESENTED ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES ..... iv-vii

INTERESTS OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3-13

I. Other than the fact of a prior conviction, can a defendant's mere admission of facts function as a waiver of constitutional rights, which would then allow a court to use those facts to increase the sentence beyond the relevant statutory maximum sentence that the indictment supports?

CONCLUSION 13-15

TABLE OF AUTHORITIES

Cases

Almendarez-Torres v. United States,
523 U.S. 224 (1998) 3-6, 13

Apprendi v. New Jersey,
530 U.S. 466 (2000) 3-5, 9, 13

Blakely v. Washington,
124 S. Ct. 2531 (2004) ..... passim

Bousley v. United States,
523 U.S. 614 (1998) 6

Boykin v. Alabama,
395 U.S. 238 (1969) 6, 7, 9, 14

Brady v. United States,
397 U.S. 742 (1970) 8

Carnely v. Cochran,
369 U.S. 506 (1962) 6

Commonwealth ex. rel. West v. Rundle,
237 A.2d 196 (Pa. 1968) 14

Cordova v. Hood,
84 U.S. 1 (1873) 6

De Jonge v. Oregon,
299 U.S. 353 (1937) 9

Diaz v. United States,
223 U.S. 442 (1912) 3-4

Dretke v. Haley,
124 S. Ct. 1847 (2004) 5

Duncan v. Louisiana,
391 U.S. 145 (1968) 3

Hamdi v. Rumsfield,
124 S. Ct. 2633 (2004) (plurality) 9

In re Winship,
397 U.S. 358 (1970) 5, 9

Iowa v. Tovar,
124 S. Ct. 1379 (2004) 3

Johnson v. Zerbst,
304 U.S. 458 (1938) ..... passim

Jones v. United States,
526 U.S. 227 (1999) 4, 5, 9

Libretti v. United States,
516 U.S. 29 (1995) 7

McCarthy v. United States,
394 U.S. 459 (1969) 7

Patton v. United States,
281 U.S. 276 (1930),
overruled on other grounds by,
Williams v. Florida, 399 U.S. 78 (1970) 3

Ring v. Arizona,
536 U.S. 584 (2002) 5

United States v. Broce,
488 U.S. 563 (1989) 7

United States v. Cotton,
535 U.S. 625 (2002) 9

United States v. Mezzanatto,
513 U.S. 196 (1995) 3

United States v. Ruiz,
536 U.S. 622 (2002) 8

United States v. Vonn,
535 U.S. 55 (2002) 9

Woodward v. State,
171 So. 2d 462 (1965) 7

Rules

Fed. R. Crim. P. 7 (2004) 3

Fed. R. Crim. P. 11 (1966) 7

Fed. R. Crim. P. 11 (2004) 8-10, 12

Sup. Ct. R. 37.1 (2004) 2

Sup. Ct. R. 37.6 (2004) 1

Other Authorities

Sharon M. Bunzel, The Probation Officer
and the Federal Sentencing Guidelines:
Strange Philosophical Bedfellows,
104 Yale L.J. 933 (Jan. 1994) 11

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Multitasking at Sentencing,
26 Seton Hall L. Rev. 544 (1996) 11

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Compendium of Federal Justice Statistics,
2001 (Nov. 2003) 10

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2002 Sourcebook of
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Federal Sentencing: Comment:
A Trial Judge's Second Impression
of the Federal Sentencing Guidelines,
66 S. Cal. L. Rev. 357 (Nov. 1992) 11

INTERESTS OF AMICUS CURIAE

The Office of the Federal Public Defender, Northern District of Texas, provides legal representation to over a thousand indigent individuals each year who the government has charged with violating federal criminal statutes.[1] In the end, the vast majority of our clients decide that it is in their best interest to plead guilty and are subject to the Federal Sentencing Guidelines. Accordingly, this Office has a very high interest in the outcome of this case. This Office determined that it would be in its clients' best interests to address the issue of whether a simple admission of facts, other than the fact of a prior conviction, can function as a waiver of constitutional rights. It appears from the caselaw, commentary, and the known positions of the parties that this important issue will not be addressed. With that said, the Office of the Federal Public Defender, Northern District of Texas, respectfully submits this amicus curiae brief in support of the Respondents.

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1 Letters of consent have been filed with the Clerk. Pursuant to this Court's Rule 37.6, amicus curiae states that no counsel for a party authored any part of this brief, and no person or entity, other than amicus curiae and their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This Court's precedent and the Federal Rules of Criminal Procedure weigh heavily against allowing a defendant's simple admission of facts, which increase the relevant statutory maximum sentence, to constitute an adequate waiver of constitutional rights.

This Court has held, however, that a defendant can waive constitutional rights, such as the bundle of rights referred to as *Apprendi rights*. Accordingly, a valid waiver of *Apprendi rights* would allow a sentencing court to make a factual determination that may result in a defendant receiving a sentence beyond the relevant statutory maximum sentence that the indictment supports.

Because Respondents and others will thoroughly argue that Blakely v. Washington, 124 S. Ct. 2531 (2004), applies to the Federal Sentencing Guidelines and that the Guidelines remain valid, this brief will not waste this Court's time by restating these same arguments. See Sup. Ct. R. 37.1 (2004).

ARGUMENT

I. Blakely and Waivers by Admission

A. *Almendarez-Torres v. United States, 523 U.S. 224 (1998) is the basis to the idea that a simple admission of facts allows a court to exceed the statutory maximum sentence.*

In what is arguably *dictum*, this Court stated that a defendant may waive his Apprendi rights by admitting facts. See Blakely, 124 S. Ct. at 2537. Specifically, "[w]hen a defendant pleads guilty, the [government] is free to seek *judicial sentence enhancements* so long as the defendant *either stipulates* to the relevant facts *or consents* to judicial factfinding." Id. at 2541 (emphasis added) (citing Apprendi v. New Jersey, 530 U.S. 466, 488 (2000); Duncan v. Louisiana, 391 U.S. 145, 158 (1968)). It is clear that a defendant may waive, *inter alia*, constitutional and statutory rights. See Fed. R. Crim. P. 7(b) (2004);[2] see also Iowa v. Tovar, 124 S. Ct. 1379, 1387-90 (2004); United States v. Mezzanatto, 513 U.S. 196, 200-11 (1995); Johnson v. Zerbst, 304 U.S. 458, 465 (1938);[3] Patton v. United States, 281 U.S. 276, 312-13 (1930),[4] overruled on other grounds by, Williams v. Florida, 399 U.S. 78, 90-94, 102-03 (1970); Diaz v. United

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2 This notes the ability to waive the right to an indictment.

3 Approving the waiver of the right to counsel.

4 Approving the waiver of the right to a jury trial.

States, 223 U.S. 442, 450-53 (1912).[5] However, the waiver-by-admission language in Blakely is inconsistent with this Court's precedent.

To support the proposition that a defendant may waive constitutional rights by simply admitting facts that increase the relevant statutory maximum sentence, Blakely cited a specific page in Apprendi that discussed Almendarez-Torres v. United States, 523 U.S. 224 (1998). Blakely, 124 S. Ct. at 2541 (citing Apprendi, 530 U.S. at 488). It cannot be denied, however, that Almendarez-Torres dealt only with the situation where a defendant admits to the fact of a prior conviction and not to facts that increase the relevant statutory maximum sentence. See Apprendi, 530 U.S. at 487-88; cf. Blakely, 124 S. Ct. at 2541.

Moreover, Almendarez-Torres represents an "exceptional departure from the historic practice" of requiring the government to include in the indictment those facts, *other than the fact of a prior conviction*, that increase the statutory maximum sentence of imprisonment. See Apprendi, 530 U.S. at 487-88. The reasons for this "exceptional departure" are that a defendant with a prior conviction is presumed to have enjoyed the full panoply of constitutional rights during the previous proceedings and that the courts of this country have traditionally treated recidivism as a sentencing factor.[6]

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5 Approving the waiver of the right to confrontation.

6 "[A] prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." Jones v. United States, 526 U.S. 227, 249 (1999). "The majority and the dissenters in *Almendarez-Torres*

See Apprendi, 530 U.S. at 487-88; Jones v. United States, 526 U.S. 227, 248-49 (1999); see generally Dretke v. Haley, 124 S. Ct. 1847, 1853-54 (2004); Ring v. Arizona, 536 U.S. 584, 602-09 (2002).

In sum, neither Almendarez-Torres nor Apprendi condoned a defendant waiving constitutional rights simply by admitting essential facts that would result in an increase in the relevant statutory maximum sentence, but that are not related to the fact of a prior conviction. Thus, this Court has not sanctioned such a "waiver" and it cannot reasonably be argued that a defendant can waive *Apprendi rights* by simply admitting those facts, unrelated to a prior conviction, that *increase* the defendant's relevant statutory maximum sentence. Cf. Apprendi, 530 U.S. at 488; Jones, 526 U.S. at 249; In re Winship, 397 U.S. 358, 364 (1970); Johnson, 304 U.S. at 465.[7]

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disagreed over the legitimacy of the Court's decision to restrict its holding to recidivism, but both sides agreed that the Court had done just that." Id. at 249, n10.

7 This is not to say that a defendant cannot waive or stipulate to those facts that are only relevant to the defendant's guilt, innocence, or sentence within the *relevant statutory maximum sentence*; however, such a waiver or stipulation is not so easily given when the facts are used to increase the relevant statutory maximum sentence. Cf. Blakely, 124 S. Ct. 2537; Apprendi, 530 U.S. at 490.

B. *The requirements for a valid waiver*

It is beyond peradventure that a mere factual admission does not fulfill the requirements of a voluntary and knowing waiver of *Apprendi rights*. Cf. Bousley v. United States, 523 U.S. 614, 618 (1998); Johnson, 304 U.S. at 464-65; Cordova v. Hood, 84 U.S. 1, 7 (1873).[8] For nearly 70 years Johnson has held that "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights . . . and that we 'do not presume acquiescence in the loss of fundamental rights.' . . . . A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." Johnson, 304 U.S. at 464 (citations omitted). With that, how can it be said that a defendant's simple admission of facts not included in the indictment can serve as a knowing and voluntary waiver of constitutional rights, a waiver that then allows a court to increase the relevant statutory maximum sentence, *i.e.*, sentence the defendant to an additional term of imprisonment for uncharged conduct? It cannot.[9]

8 A "[w]aiver is a thing of intention as well as of action." Cordova, 84 U.S. at 7.

9 The Court has clearly held that "'[p]resuming waiver from a silent record is impermissible.'" Boykin v. Alabama, 395 U.S. 238, 242 (1969) (quoting Carnely v. Cochran, 369 U.S. 506, 516 (1962)). Indeed, a simple admission does not "speak" to whether the person has knowingly and voluntarily waived their constitutional rights. Cf. Boykin, 395 U.S. at 242-43.

It is no good to say that the defendant's guilty plea can "subsidize" a defendant's admission such that the admission would fulfill the requirements of a waiver of constitutional rights. A "guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law *in relation to the facts*." McCarthy v. United States, 394 U.S. 459, 466 (1969) (emphasis added); see United States v. Broce, 488 U.S. 563, 570 (1989). Because the guilty plea is directly related to *conduct that the government includes in the indictment*, the trial "judge must determine 'that the *conduct* which the defendant admits constitutes the offense *charged in the indictment* or information or an offense included therein to which the defendant has pleaded guilty.'" McCarthy, 394 U.S. at 467 (emphasis added) (quoting Fed. R. Crim. P. 11, Notes of Advisory Committee on Criminal Rules (1966)); see Libretti v. United States, 516 U.S. 29, 38 (1995); Boykin v. Alabama, 395 U.S 238, 242-43 (1969).[10]

Accordingly, a court cannot piggyback a defendant's admission of facts that increase the relevant statutory maximum sentence onto a plea of guilty; the admitted conduct was not included in the indictment or information and cannot be used, absent a sufficient waiver, to increase a defendant's relevant statutory maximum sentence. Cf. Boykin, 395 U.S. at 242-43; McCarthy, 394 U.S. at 466. Moreover, if allowed, there would be no guarantee that the defendant was aware of his rights to a jury trial and proof beyond a reasonable doubt with regard to the facts that

10 A "plea of guilty is *more than an admission of conduct*; it is a conviction." Boykin, 395 U.S. at 242 (emphasis added) (citing Woodward v. State, 171 So. 2d 462, 469 (Ala. 1965)).

increase the relevant statutory maximum sentence. Cf. Johnson, 304 U.S. 464-65.[11]

C. *Federal Rule Criminal Procedure 11*

The Rules of Federal Criminal Procedure provide further support for the contention that simple admissions are insufficient to waive constitutional and statutory rights. See

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11 That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized. Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts *charged in the indictment*. He thus stands as a witness against himself and he is shielded by the Fifth Amendment from being compelled to do so-- hence the minimum requirement that his plea be the voluntary expression of his own choice. . . . . But the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial-- a waiver of his right to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.

Brady v. United States, 397 U.S. 742, 748 (1970) (emphasis added) (citations omitted); see United States v. Ruiz, 536 U.S. 622, 628-29 (2002).

Boykin, 395 U.S. at 243, n.5; Fed. R. Crim. P. 11(b) (2004).[12] Rule 11(b) clearly outlines the proper method for receiving a defendant's waiver of rights during a guilty plea. Fed. R. Crim. P. 11(b). Rule 11(b) includes a plethora of constitutional and statutory rights that a sentencing court must address. Id.[13] The fact that Rule 11(b) requires a sentencing court to personally address the defendant and ensure that the defendant knows what rights are being waived and that the waiver is voluntary provides a strong argument that a simple admission of facts cannot be used against the defendant to increase the relevant statutory maximum sentence. See id.

In fact, as a matter of practice, no federal judge would take a guilty plea based solely on a defendant's factual admission. Cf. De Jonge v. Oregon, 299 U.S. 353, 362 (1937). Before taking a guilty plea, sentencing judges ensure that a defendant knows and understands his constitutional and statutory rights and knowingly and voluntarily waives such rights. See Fed. R. Crim. P. 11(b). Judges ensure that all of this has occurred by conducting a colloquy pursuant to Fed.

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12 "Rule 11 of the Federal Rules of Criminal Procedure requires a judge to address a defendant about to enter a plea of guilty, to *ensure that he understands the law of his crime in relation to the facts of his case*, as well as his rights as a criminal defendant." United States v. Vonn, 535 U.S. 55, 62 (2002) (emphasis added).

13 Because Rule 11(b) does not address all of the *Apprendi rights*, a colloquy based solely on the current version of Rule 11(b) is inadequate. Compare Fed. R. Crim. P. 11(b) to Hamdi v. Rumsfield, 124 S. Ct. 2633, 2646-49 (2004) (plurality); United States v. Cotton, 535 U.S. 625, 627 (2002); Apprendi, 530 U.S. at 482-84, 490, n.15; Jones, 526 U.S. at 243, n.6; In re Winship, 397 U.S. at 364.

R. Crim. P. 11(b). See id. A mere admission of facts is clearly insufficient. See id.; cf. Johnson, 304 U.S. at 464.

IV. Redeeming Waivers by Admission

In fiscal year 2001, the government prosecuted 82,614 defendants: 89% of these were convicted. United States Department of Justice, Compendium of Federal Justice Statistics, 2001, at *55 (Nov. 2003). Of the convicted, 95% pleaded guilty and 5% lost at trial. Id. (Figure 4.1). Of the remaining 11% of defendants who were not convicted, the government dismissed the charges against the vast majority; statistically, it appears that only 10% of the remaining 11% of defendants went to trial and won. See id.; cf. United States Sentencing Commission, 2002 Sourcebook of Federal Sentencing Statistics, at *20 (2002) (Figure C). It is clear from these numbers that nearly all of the people that the government pursues charges against will have the Federal Sentencing Guidelines applied to their case.

It is common knowledge that these legions of defendants who plead guilty, must, as part of the plea colloquy, admit facts related to the charged offenses. On some occasions the admissions are strictly limited to the charged offense and specifically track the indictment. On many other occasions, however, the admissions include facts that go well beyond the elements of the offenses that Congress has prescribed.[14]

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14 Beyond these admissions are the "facts" that a probation officer gleans from various "sources" that also increase the relevant statutory maximum sentence. For defendants, defense attorneys, and some prosecuting attorneys, this is one of the most aggravating

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aspects of the Federal Sentencing Guidelines. The Guidelines allow a probation officer to "investigate" and then include "facts" that result in surprise enhancements in the Presentence Report that neither the government nor the defendant expected. It is heartening to read that this Court understands this problem:

> Any evaluation of Apprendi's 'fairness' to criminal defendants must compare it with the regime it replaced, in which a defendant, with no warning in either his indictment or plea, would routinely see his maximum potential sentence balloon . . . based not on facts proved to his peers beyond a reasonable doubt, *but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong.*

Blakely, 124 S. Ct. at 2542 (emphasis added).

It is also clear that probation officers periodically act as quasi-prosecutors by making legal arguments to increase a defendant's statutory maximum sentence. See Sharon M. Bunzel, The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows, 104 Yale L.J. 933, 961-65 (Jan. 1994). Even worse, probation officers are sometime seen as the "Pinocchios in the hands of prosecutorial Geppettos." The Honorable Jack B. Weinstein, United States District Judge, Symposium on Federal Sentencing: Comment: A Trial Judge's Second Impression of the Federal Sentencing Guidelines, 66 S. Cal. L. Rev. 357, 360 (Nov. 1992); see also Gary M. Maveal, Articles: Federal Presentence Reports: Multitasking at Sentencing, 26 Seton Hall L. Rev. 544, 567-96 (1996).

In those instances, if Blakely applies to the Federal Sentencing Guidelines and the Guidelines remain valid, a defendant can admit facts that would allow the sentencing court to increase the defendant's sentence beyond the relevant statutory maximum sentence that the indictment supports. Again, Johnson and its progeny pellucidly hold that in order for the admission to act as a valid waiver of rights, the government must procure a sufficient waiver as part of a plea agreement that would then allow the sentencing court to make a factual determination based on those admitted facts; the sentencing court must then perform a proper plea colloquy informing the defendant of the waiver of constitutional rights regarding those specific factual admissions. Cf. Johnson, 304 U.S. at 464-65; Fed. R. Crim. P. 11.

Admittedly, the admission and adequate waiver become problematic in the arena of one-count indictments that do not include "specific offense characteristics." If a single count formed the sum total of the defendant's criminal conduct, the defendant would have no incentive to increase the relevant statutory maximum sentence. The government

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In a defense attorney's eyes, the best result of applying Blakely to the Federal Sentencing Guidelines will be reducing a probation officer's impact in determining the offense-level and allowing the prosecuting and defense attorneys to come to an agreement as to a defendant's "enhancements" and relevant statutory maximum sentence. When this occurs, a defendant will truly know what offense level he or she is bargaining for and then we can all truthfully say that the defendant has knowingly and voluntarily waived constitutional rights.

could resolve this, however, by superceding the indictment to include the guideline "elements" or by offering the defendant some consideration for admitting the facts and signing an adequate waiver.

In a multi-count indictment, this is less of a problem. In such a case, the defendant usually receives some consideration for the guilty plea in the form of a reduction in charges, which usually results in a lower guideline range. As part of the bargain, the government could insist that the defendant admit specific facts that will increase the relevant statutory maximum sentence and further insist that the defendant sign a waiver of constitutional rights related to the specific admitted facts and subsequent sentence.

CONCLUSION

Blakely, citing Apprendi, discussing Almendarez-Torres does not support the proposition that a defendant can waive constitutional rights by simply admitting facts, which are not facts related to a prior conviction, that increase the relevant statutory maximum sentence. Any such statement is contrary to this Court's precedent. The defendant, however, can admit facts in conjunction with a valid waiver of enumerated rights that will allow the judge to increase the relevant statutory maximum sentence. As part of this procedure, the sentencing court must fully inform the defendant of the rights being waived and the results of such a waiver. Only then will a defendant knowingly and voluntarily have waived constitutional and statutory rights.[15]

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15 'A majority of criminal convictions are obtained after a plea of guilty. If these convictions are to be

Cf. Boykin, 395 U.S. at 242-244; Johnson, 304 U.S. at 464.

The bottom line is that the application of Blakely to the Federal Sentencing Guidelines, when combined with *admitted facts and valid waivers*, will result in defendants actually receiving the guideline range that they bargained for: this would be real "truth in sentencing."[16]

> insulated from attack, the trial court is best advised to conduct an on the record examination of the defendant which should include . . . an attempt to satisfy itself that the defendant understands the nature of the charges, his right[s] . . . , *the acts sufficient to constitute the offenses for which he is charged and the permissible range of sentences.*'

Boykin, 395 U.S. at 244, n.7 (emphasis added) (quoting Commonwealth ex. rel. West v. Rundle, 237 A.2d 196, 197-98 (Pa. 1968)).

16 The Sentence Commission notes that 47.9% of its 6,290 appeals before the Circuit Courts of Appeal, which is 3,014 appeals, were filed strictly for perceived sentencing errors. Sentencing Commission, 2002 Sourcebook of Federal Sentencing Statistics, at *101 (2002) (Table 55). It cannot be denied that giving the defendant the sentence bargained for would dramatically reduce the number of appeals, thus saving significant judicial resources.

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FILED
SEP 1 - 2004
OFFICE OF THE CLERK

(10) (9)

Nos. 04-104 & 04-105

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BRIEF FOR THE HONORABLE ORRIN G. HATCH, HONORABLE EDWARD M. KENNEDY, AND HONORABLE DIANNE FEINSTEIN AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, or to what extent, the Court should give effect to the intent of Congress in enacting the Sentencing Reform Act of 1984 to eliminate the intolerable disparities that had plagued the federal sentencing system by creating an integrated and cohesive sentencing guidelines system.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. THE INTOLERABLE DISPARITIES THAT PLAGUED THE INDETERMINATE FEDERAL SENTENCING SYSTEM DEMANDED A COMPREHENSIVE LEGISLATIVE RESPONSE	6
II. THE 1984 ACT WAS THE PRODUCT OF MORE THAN A DECADE OF BIPARTISAN AND INTER-BRANCH DELIBERATIONS ON RESOLVING THE SENTENCING CRISIS	12
III. THE CENTERPIECE OF THE 1984 ACT WAS THE ADOPTION OF A COMPREHENSIVE SENTENCING GUIDELINES SYSTEM	15
IV. THE SENTENCING GUIDELINES WERE INTENDED TO OPERATE AS AN INTEGRATED SYSTEM OF CALIBRATIONS AND BASED ON JUDGE-MADE DETERMINATIONS	21
CONCLUSION	26

TABLE OF AUTHORITIES

Page

CASES:

Blakely v. *Washington*,
124 S. Ct. 2531 (2004) 1, 3, 6

Dorszynski v. *United States*,
418 U.S. 424 (1974) 7, 8, 9, 16

Ex parte United States,
242 U.S. 27 (1916) 7

Freeman v. *United States*,
243 F. 353 (9th Cir. 1917),
cert. denied, 249 U.S. 600 (1919) 8

Gurera v. *United States*,
40 F.2d 338 (8th Cir. 1930) 8

Mistretta v. *United States*,
488 U.S. 361 (1989) 3, 6, 11, 16, 17, 25

United States v. *Grayson*,
438 U.S. 41 (1978) 7, 8

United States v. *Hendrix*,
505 F.2d 1233 (1974),
cert. denied, 423 U.S. 897 (1975) 8

United States v. *Hudson*,
11 U.S. (7 Cranch) 32 (1812) 7

United States v. *Tucker*,
404 U.S. 443 (1972) 8

United States v. *Watts*,
519 U.S. 148 (1997) 19

TABLE OF AUTHORITIES—Continued

Page

United States v. *Wiltberger*,
18 U.S. (5 Wheat.) 76 (1820) 7

RULE:

Supreme Court Rule 37.6 1

STATUTES:

18 U.S.C. § 3553(a) 18

18 U.S.C. § 3553(a)(1) 18

18 U.S.C. § 3553(a)(7) 17

18 U.S.C. § 3553(b) (1986) 8, 18

18 U.S.C. § 3553(c) 20

18 U.S.C. § 3577 (1976) 8

18 U.S.C. § 3661 19

28 U.S.C. § 334(a) 9

28 U.S.C. § 991(a) 16

28 U.S.C. § 991(b)(1) 16

28 U.S.C. § 991(b)(1)(B) 16

28 U.S.C. § 994(a)(1) 16, 23

28 U.S.C. § 994(c)(2) 22

28 U.S.C. § 994(d) 19

28 U.S.C. § 994(m) 17

TABLE OF AUTHORITIES—Continued

	Page
An Act for the Punishment of Certain Crimes Against the United States, 1 Stat. 113-115	7
Act of Apr. 30, 1790, ch. 9, § 7, 1 Stat. 113	7
Act of Apr. 30, 1790, ch. 9, § 22, 1 Stat. 117	7
Act of Mar. 3, 1853, ch. 104, § 4, 10 Stat. 239	7
Act of Mar. 3, 1891, ch. 517, 26 Stat. 826	8
Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837	2, 15
Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, § 401(b), (g), and (*i*), 117 Stat. 668-669, 671-673 (Apr. 30, 2003)	17
Sentencing Reform Act of 1984, Pub. L. No. 98-473, title II, ch. II, 98 Stat. 1987	*passim*
U.S. SENTENCING GUIDELINES:	
U.S. Sentencing Guidelines § 1B1.4	19
U.S. Sentencing Guidelines § 1B1.11	21
U.S. Sentencing Guidelines § 5G1.1	20
U.S. Sentencing Guidelines § 5H1.10	20
U.S. Sentencing Guidelines § 6A1.3(b)	23

TABLE OF AUTHORITIES—Continued

	Page
LEGISLATIVE MATERIALS:	
H.R. Rep. No. 1946, 85th Cong., 2d Sess. (1958)	9
H.R. Rep. No. 1396, 96th Cong., 2d Sess. (1980)	13
H.R. Rep. No. 1017, 98th Cong., 1st Sess. (1983)	11, 12, 15
S. Rep. No. 2013, 85th Cong., 2d Sess. (1958)	9
S. Rep. No. 223, 98th Cong., 1st Sess. (1983)	14
S. Rep. No. 225, 98th Cong., 1st Sess. (1983)	*passim*
Reform of the Federal Criminal Laws: Hearing Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess., Pt. 13 (1977)	11, 13
Federal Sentencing Revision: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 98th Cong., 2d Sess., Pt. 2 (1984)	11
Sentencing Guidelines: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 100th Cong., 1st Sess. (1987)	25

TABLE OF AUTHORITIES—Continued

Page

Blakely v. Washington *and the Future of the Sentencing Guidelines: Hearing Before the Senate Comm. on the Judiciary,* 108th Cong. 2d Sess. (2004) 3, 24

H.R. 6915, 96th Cong., 2d Sess. (1980)..... 13

S. 2699, 94th Cong., 1st Sess. (1975)..... 12

S. 1437, 95th Cong., 1st Sess. (1977)..... 13

S. 1722, 96th Cong., 1st Sess. § 125 (1979)..... 13

S. 1630, 97th Cong., 1st Sess. § 125 (1981)..... 13

S. 2572, 97th Cong., 2d Sess. (1982)..... 13

S. 688, 98th Cong., 1st Sess. (1983)..... 13, 14

S. 829, 98th Cong., 1st Sess. (1983)..... 14, 15

S. 1762, 98th Cong., 1st. Sess. (1983)..... 14, 15

S. Con. Res. 130, 108th Cong. 2d Sess. (2004)..... 3

129 Cong. Rec. S2090 (daily ed. Mar. 3, 1983)..... 14

130 Cong. Rec. S759 (daily ed. Feb. 2, 1984) 14

130 Cong. Rec. H10130 (daily ed. Sept. 25, 1984) 15

150 Cong. Rec. S8572 (daily ed. July 21, 2004)..... 3

TABLE OF AUTHORITIES—Continued

Page

OTHER:

Hon. Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Federal Sentencing Reporter 180 (Jan./Feb. 1999), 1999 WL 730985 (Vera Inst. Just.) 12

Hon. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra 1 (1988) 21-22

Arthur W. Campbell, *Law of Sentencing* § 1:3 (2d ed. 1991)..... 11

Developments in the Law—Race and the Criminal Process, 101 Harv. L. Rev. 1472 (1988) 11, 16, 20

Federal Sentencing Guidelines Manual..... 21

Marvin Frankel, *Criminal Sentences: Law Without Order* (1972)..... 10

Charlton T. Lewis, *The Indeterminate Sentence*, 9 Yale L.J. 17 (1900)..... 9

Long v. *Short Sentences*, 20 Wash. L. Rep. 135 (1892) 9

National Commission on Reform of Federal Criminal Laws, *Final Report* (1971)..... 12

Whitney N. Seymour, *1972 Sentencing Study for the Southern District of New York*, 45 N.Y.S. B.J. 163 (1973) 10

U.S. Dep't of Justice, *Annual Reports of the Attorney General* 9

TABLE OF AUTHORITIES—Continued

Page

U.S. Sentencing Comm'n, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* (1987)..... 17

IN THE

Supreme Court of the United States

No. 04-104

UNITED STATES OF AMERICA,

Petitioner,

v.

FREDDIE J. BOOKER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

No. 04-105

UNITED STATES OF AMERICA,

Petitioner,

v.

DUCAN FANFAN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR THE HONORABLE ORRIN G. HATCH, HONORABLE EDWARD M. KENNEDY, AND HONORABLE DIANNE FEINSTEIN AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE

These cases present the Court with an opportunity to resolve the chaos and confusion that has arisen in the wake of

Blakely v. *Washington*, 124 S. Ct. 2531 (2004), over the continued application of the United States Sentencing Guidelines, and to restore order and certainty to the federal sentencing system.[1] The federal sentencing guidelines system at issue in these cases is the product of the Sentencing Reform Act of 1984 (1984 Act), which was enacted as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837. The 1984 Act represents the most comprehensive effort ever undertaken by Congress to reform the federal sentencing system. It is the product of more than a decade of inter-branch and bipartisan legislative efforts in both Houses of Congress to eliminate the "shameful disparity in criminal sentences" that had long plagued the federal sentencing system and fostered "a disrespect for the law." S. Rep. No. 225, 98th Cong., 1st Sess. 46, 65 (1983).

Amici are a bipartisan group of United States Senators who have been extensively involved with sentencing issues. Senator Orrin G. Hatch is a Republican from Utah. He is the current Chairman of the Senate Judiciary Committee, has served on the Judiciary Committee since 1977, and is one of the original co-sponsors of the bill that became the 1984 Act. See *infra* at 13. Senator Edward M. Kennedy is a Democrat from Massachusetts. He has served on the Judiciary Committee since 1962, and introduced the bill that became the 1984 Act. *Id.* at 14. Senator Dianne Feinstein is a Democrat from California. She is the first woman member of the Senate Judiciary Committee and has served on the Committee since 1994. The Senate Judiciary Committee has legislative jurisdiction over the federal criminal justice system, including sentencing. Members of the Committee have been extensively involved in drafting the 1984 Act, monitoring the

[1] Pursuant to Supreme Court Rule 37.6, counsel for amici states that no counsel for a party authored this brief in whole or part and that no entity other than counsel for amici made a monetary contribution to the preparation or submission of the brief. All parties have consented to the filing of this brief.

operation of the federal sentencing guidelines system, and amending federal sentencing law when appropriate.

Amici support the continued application of the United States Sentencing Guidelines—the centerpiece of the 1984 Act—to eliminate the unwarranted disparities that proliferated under the prior sentencing regime and to foreclose the consideration of race, gender, and other illegitimate factors at sentencing. Amici have a strong interest in defending the constitutionality of the 1984 Act and note that the United States Senate filed a brief in support of the Act in *Mistretta* v. *United States*, 488 U.S. 361 (1989). See Nos. 87-1904 & 87-7028, Br. for U.S. Senate as Amicus Curiae. In addition, if this Court concludes that the enhancement provisions of the sentencing guidelines were not constitutionally applied in these cases, amici have a strong interest in ensuring that the guidelines are not applied in a piecemeal fashion in subsequent cases, but rather are applied—as they were intended to be applied—only as a cohesive and integrated whole.

Amici have a strong interest in promoting order, consistency, and fairness in the federal sentencing system. On July 13, 2004, the Senate Judiciary Committee held a hearing on the potential impact of the *Blakely* decision on the federal criminal justice system, during which the Committee received testimony from federal judges, law enforcement officials, academics, and criminal lawyers. See *Blakely v. Washington and the Future of the Sentencing Guidelines* (transcripts available at http://judiciary.senate.gov/hearing.cfm?id=1260). In addition, amici—along with all their colleagues in the Senate—voted in favor of the Concurrent Resolution that was passed unanimously by the Senate on July 21, 2004, urging this Court to grant certiorari in these cases and "expeditiously to resolve the current confusion and inconsistency in the Federal criminal justice system by promptly considering and ruling on the constitutionality of the Federal Sentencing Guidelines." S. Con. Res. 130 at 4; see 150 Cong. Rec. S8572-S8574 (daily ed. July 21, 2004).

SUMMARY OF ARGUMENT

The Court's resolution of the important issues presented by these cases should be informed by the urgent practical and policy considerations that led to the passage of the Sentencing Reform Act of 1984, the intent of Congress in establishing a federal sentencing guidelines system, and the fundamental values and compromises on which that system rests.

During the 19th century and most of the 20th century, federal sentencing was generally conducted pursuant to an indeterminate system. For most offenses, Congress proscribed a range of punishment that could be imposed for an individual convicted of a particular offense, but judges were free to impose a sentence anywhere within that statutory range based on the consideration of virtually any information that a court deemed relevant with respect to the specific characteristics of the defendant or conduct in which he had engaged. That discretionary sentencing system produced astounding disparities among the sentences that were imposed on defendants convicted of the same offense with similar backgrounds within different judicial districts across the country—and even among different judges in the same district. In addition, studies indicated that the disparities that proliferated under this sentencing system not only were arbitrary, but, in at least some cases, were based on the consideration of race, gender, and other illegitimate factors.

The Sentencing Reform Act of 1984 represents Congress's considered response to that crisis. The 1984 Act reflects more than a decade's worth of reports, hearings, and deliberations on federal sentencing and is the product of an extraordinary coalescence of inter-branch cooperation and bipartisan support in both Houses of Congress. The cornerstone of the Act was the creation of a federal sentencing guidelines system. Sentencing guidelines offered a middle-ground approach between sticking with the failed indeterminate system of sentencing and adopting a rigid system of

determinate sentencing, in which Congress specified applicable sentences for federal offenses and judges simply imposed sentence without any individualized consideration of the offender or his criminal conduct. Under the guidelines system established pursuant to the 1984 Act, district court judges are still free—and, indeed, obligated—to consider available information concerning an offender and his offense, including factors not found by a jury or contained in a plea agreement. But the guidelines *channel* the manner in which a judge may impose sentence based on that information in order to avoid unwarranted disparities in sentencing.

Congress intended the federal sentencing guidelines to be applied as an integrated and cohesive whole. The guidelines establish an interlocking system of calculations and calibrations that are part of a single sentencing equation. In particular, the Congress that enacted the 1984 Act intended sentencing judges to have flexibility to move a sentence both upward and downward within the applicable guidelines range based on an individualized consideration of the offender and his offense and, in unusual cases, to depart upward or downward outside of the guidelines range. Holding that sentencing judges are free to consider facts or circumstances not found by a jury or contained in a plea agreement for purposes of *reducing* a sentence—but not enhancing it—would conflict with Congress's intent in enacting the 1984 Act to ensure that the sentencing guidelines fostered individualized sentencing reflecting aggravating *as well as* mitigating factors found by a judge, and that the guidelines produced sentences that were fair to the offender *as well as* society.

At the same time, in adopting a guidelines system, Congress intended to preserve the traditional role of judges in making the myriad factual determinations that judges—rather than juries—have long made in the course of sentencing defendants in noncapital cases in the federal criminal justice system. Attempting to substitute a sentencing *jury* for a sentencing judge in applying the sentencing guidelines—

even only for the sake of enhancing sentences—would contravene the express terms of the 1984 Act and in all likelihood fundamentally upset the sentencing system established by that Act. Accordingly, that is the sort of reform that should come, if at all, only after careful legislative inquiry and deliberation as to the potential practical and financial costs of attempting to engraft a jury-sentencing system onto the existing sentencing guidelines system, and as to whether more desirable sentencing alternatives exist. In our constitutional system, these sorts of determinations—like the judgment whether to adopt a sentencing guidelines system in the first place—are uniquely suited for legislative consideration and compromise.

Like all Acts of Congress, the 1984 Act is entitled to a strong presumption of constitutionality. The shameful disparities that existed under the prior sentencing system, extensive legislative deliberations on how to avoid such disparities, and strong bipartisan consensus that emerged for adopting a sentencing guidelines system if anything call for even greater caution on the part of this Court in considering the arguments that have been advanced in the wake of *Blakely* for dismantling that considered legislative effort.

ARGUMENT

I. THE INTOLERABLE DISPARITIES THAT PLAGUED THE INDETERMINATE FEDERAL SENTENCING SYSTEM DEMANDED A COMPREHENSIVE LEGISLATIVE RESPONSE

The Constitution does not assign to any one Branch of the National Government the responsibility for federal sentencing—*i.e.*, the authority to determine "the scope and extent of punishment" for the commission of a particular criminal offense. *Mistretta* v. *United States*, 488 U.S. 361, 364 (1989). It is well established, however, that "Congress * * * has the power to fix the sentence for a federal crime," and that "the scope of judicial discretion with respect to a sentence is subject to congressional control." *Ibid.* (citing *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820); *Ex parte United States*, 242 U.S. 27 (1916)); cf. *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) (Before a federal court may recognize a criminal offense, "[t]he legislative authority of the Union must first make an act a crime, *affix a punishment to it*, and declare the Court that shall have jurisdiction of the offense.") (emphasis added).

From the First Congress forward, Congress has passed statutes proscribing criminal offenses and fixing the degree of permissible punishment for such offenses. See An Act for the Punishment of Certain Crimes Against the United States, 1 Stat. 113-115, 117-118. For much of the first two centuries of our history, however, Congress typically left courts broad leeway to impose sentences on convicted offenders within a statutory range or up to a maximum amount.[2] In exercising that discretion, a sentencing judge was free to consider any aggravating or mitigating circumstances that the judge believed to be relevant to his decision and, after weighing those factors, to select a sentence "within an often broad, congressionally prescribed range." *United States* v. *Grayson*, 438 U.S. 41, 47 (1978); see *id.* at 46. That discretion was not only wide, but, as this Court put it, virtually "unfettered." *Dorszynski* v. *United States*, 418 U.S. 424, 437 (1974).

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[2] In *United States* v. *Grayson*, 438 U.S. 41, 45 (1978), the Court observed that, "[i]n the early days of the Republic, * * * [e]ach crime had its defined punishment." From the First Crimes Act, however, Congress generally set statutory ranges or maximums rather than fixed sentences for federal offenses. See, *e.g.*, Act of April 30, 1790, ch. 9, § 7, 1 Stat. 113 (manslaughter: imprisonment not exceeding three years and a fine not exceeding $1000); *id.* § 22, 1 Stat. 117 (obstruction of process: imprisonment not exceeding one year and fine not exceeding $300). Historically, it was rare for Congress to set fixed terms of imprisonment. See, *e.g.*, Act of Mar. 3, 1853, ch. 104, § 4, 10 Stat. 239 (embezzlement by government employee: imprisonment of two years plus fine).

Under this regime, a sentencing judge could "appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *Grayson*, 438 U.S. at 49 (quoting *United States* v. *Tucker*, 404 U.S. 443, 446 (1972)); see also 18 U.S.C. § 3577 (1976) ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."). Thus, for example, a sentencing judge was free not only to consider information in presentence reports, but to weigh "evidence heard during trial," "the demeanor of the accused," as well as personal " '[i]mpressions about the individual being sentenced—the likelihood that he will transgress no more, the hope that he may respond to rehabilitative efforts * * * , the degree to which he does or does not deem himself at war with society.'" *Grayson*, 438 U.S. at 50-51 (quoting *United States* v. *Hendrix*, 505 F.2d 1233, 1236 (2d Cir. 1974) (opinion by Frankel, J.), cert. denied, 423 U.S. 897 (1975)).

At the same time, while appellate jurisdiction initially was available to correct egregious disparities such as unduly harsh sentences, that changed in 1891. Courts interpreted an 1891 statute (Act of Mar. 3, 1891, ch. 517, 26 Stat. 826) to have impliedly repealed appellate jurisdiction over sentencing. See *Freeman* v. *United States*, 243 F. 353, 357 (9th Cir. 1917), cert. denied, 249 U.S. 600 (1919). And soon the "rule" was "firmly established * * * that the appellate court has no control over a sentence which is within the limits allowed by a statute." *Dorszynski*, 418 U.S. at 440-441 (quoting *Gurera* v. *United States*, 40 F.2d 338, 340-341 (8th Cir. 1930)); see *id.* at 441 ("[I]f a judge imposed a sentence within that range, his exercise of discretion * * * was not subject to challenge [on appeal]."). The result was that in the United States—unlike every other " 'nation in the free world' "—"the 'discretion of the judge . . . in (sentencing)

matters [was] virtually free of substantive control or guidance.' " *Id.* at 440 n.14 (quoting law reviews).

By the close of the 19th century, commentators had begun to report on the "gross and startling inequities" that this discretionary system of sentencing produced. *Long v. Short Sentences*, 20 Wash. L. Rep. 135 (1892); see also Carlton T. Lewis, *The Indeterminate Sentence*, 9 Yale L.J. 17, 18 (1900). And early in the 20th century, the Executive Branch reported the problem to Congress. In 1938, Attorney General Cummings informed Congress "that there frequently occur wide disparities and great inequities in sentences imposed in different districts, and even by different judges in the same districts, for identical offenses involving similar states of facts," making "it difficult to maintain that equal, even-handed justice is attained." U.S. Dep't of Justice, *Annual Report of the Attorney General*, 6, 7 (1938). Attorneys General Murphy, Jackson, and Biddle returned to Congress and reiterated that same message. See *id.* at 6 (1939) (Murphy); *id.* at 5-7 (1940) (Jackson); *id.* at 4 (1941) (Biddle).

In 1958, Congress itself took note of the "existence of widespread disparities in the sentences imposed by Federal courts * * * in different parts of the country, between adjoining districts, and even in the same districts." H.R. Rep. No. 1946, 85th Cong., 2d Sess. 6 (1958). Congress responded by authorizing the creation of judicial sentencing institutes and joint councils to formulate advisory "objectives, policies, standards, and criteria for sentencing." 28 U.S.C. § 334(a). These voluntary measures were intended to encourage "[f]ederal judges [to] reach a desirable degree of consensus as to the types of sentences which should be implemented in different kinds of cases." S. Rep. No. 2013, 85th Cong., 2d Sess. 3 (1958). The 1958 statute, however, failed to curb the disparities in federal sentencing. Indeed, one leading authority—Federal Judge Marvin Frankel—went so far as to suggest that "the sentencing institute is almost irrelevant," and that the disparities under the existing sentencing system

were "terrifying and intolerable for a society that professes devotion to the rule of law." Marvin Frankel, *Criminal Sentences: Law Without Order* 5, 66 (1972).[3]

The crisis continued. During the 1970s, a number of empirical studies were issued demonstrating the gross disparities in federal sentencing. For example, a 1972 study undertaken by the United States Attorney's Office for the Southern District of New York determined that "[t]he range in average sentences for forgery runs from 30 months in the Third Circuit to 82 months in the District of Columbia. For interstate transportation of stolen motor vehicles, the extremes in average sentences are 22 months in the First Circuit and 42 months in the Tenth Circuit." S. Rep. No. 225, 98th Cong., 1st Sess. 41 n.21 (1983) (quoting Whitney N. Seymour, *1972 Sentencing Study for the Southern District of New York*, 45 N.Y.S. B.J. 163, 167 (1973)). A 1974 study undertaken by the Second Circuit underscored the problem. Fifty district court judges were given the identical files from 20 actual criminal cases and asked to impose a sentence. "The variations in the judges' proposed sentences in each case were astounding." *Id.* at 41; see *id.* at 42-43 (chart summarizing the results of the Second Circuit sentencing study).

Another study undertaken by the Department of Justice asked 208 sitting federal judges to indicate the sentences that they would impose in 16 hypothetical cases, 8 bank robbery cases, and 8 fraud cases. The results were similarly startling:

> In only 3 of the 16 cases was there a unanimous agreement to impose a prison term. Even where most judges agreed that a prison term was appropriate, there was a substantial variation in the lengths of prison terms recommended. In one fraud case in which the mean prison term was 8.5 years, the longest term was life in prison. In another case the mean prison term was 1.1 years, yet the longest prison term recommended was 15 years.

[3] To resolve the sentencing crisis, Judge Frankel proposed the creation of a permanent agency—or commission—composed of judges and experts that would study sentencing and eventually enact "a detailed chart or calculus to be used * * * by the sentencing judge in weighing the many elements that go into the sentence." Frankel, *supra*, at 113.

S. Rep. No. 225, *supra*, at 44 (footnotes omitted). Numerous other reports similarly confirmed "the existence of widespread sentencing disparity." *Id.* at 44 n.23 (listing studies). See also *Mistretta*, 488 U.S. at 365 ("Serious disparities in sentences * * * were common" during this period.).

Even more disturbing, studies indicated that the disparity in sentencing was not just arbitrary, but, in at least some cases, the product of judicial consideration of race, gender, and other illegitimate factors. See *Reform of the Federal Criminal Laws: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess., Pt. 13, 9047 (1977) (hereinafter *1977 Senate Judiciary Committee Hearings*) ("The statistics are appalling. * * * [W]hen both the crime and the previous history of the offender are held equal, black and minority offenders fare considerably worse.") (testimony of Prof. Alan M. Dershowitz); H.R. Rep. No. 1017, 98th Cong., 1st Sess. 102 (1983) (noting the "potential for sentencing decisions to be based on inappropriate grounds such as race or sex"); see also *Federal Sentencing Revision: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 98th Cong., 2d Sess., Pt. 2, at 1118, 1179 (1984); *Developments in the Law—Race and the Criminal Process*, 101 Harv. L. Rev. 1472, 1630 (1988); Arthur W. Campbell, *Law of Sentencing* § 1:3, at 9-10 & nn. 45-46 (2d ed. 1991) (citing studies reporting race- and gender-based disparities).

In short, the evidence overwhelmingly established that the discretionary-sentencing scheme that Congress had embraced, with only relatively minor deviations, for more than a century had generated a "shameful disparity in criminal

sentences" and, what is more, "create[d] a disrespect for the law." S. Rep. No. 225, *supra*, at 46, 65. See also H.R. Rep. No. 1017, *supra*, at 31-32 ("Current practices result in widespread disparity among sentences imposed on defendants convicted of similar crimes. * * * Respect for the law cannot flourish among convicted defendants or the public when justice is undercut by unequal treatment.").

II. THE 1984 ACT WAS THE PRODUCT OF MORE THAN A DECADE OF BIPARTISAN AND INTER-BRANCH DELIBERATIONS ON RESOLVING THE SENTENCING CRISIS

Congress responded to that crisis by enacting the Sentencing Reform Act of 1984—one of the most significant legal reforms in American history. The 1984 Act was the culmination of more than a decade's worth of studies, hearings, and thoughtful discussions that have been traced to the Final Report of the National Commission on Reform of Federal Criminal Laws in 1971. See S. Rep. No. 225, *supra*, at 37. The 1971 report was followed by a strong bipartisan effort to reform the federal sentencing system that spanned four presidential administrations, produced bills sponsored by the leading members of both parties in both Houses of Congress, received the support of numerous federal judges and the Department of Justice, and attracted the contributions of the Nation's leading legal academics and practitioners. See *ibid.*; H.R. Rep. No. 1017, *supra*, at 32-34. See Hon. Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Federal Sentencing Reporter 180 (Jan./Feb. 1999), 1999 WL 730985 (Vera Inst. Just.), at *1 (noting the "bipartisan fashion" in which Congress acted in passing the 1984 Act).

In 1975, Senator Kennedy introduced a bill (S. 2699) that first proposed the creation of a commission to promulgate sentencing guidelines. See S. 2699, 94th Cong., 1st Sess. (1975). The concept of a sentencing commission was refined by Senators Kennedy and McClellan and included in a more

comprehensive bill to revise the criminal code. See S. 1437, 95th Cong., 1st Sess. (1977). In 1977, the Senate held extensive hearings on the 1971 National Commission Report and the legislative proposals—including the adoption of federal sentencing guidelines—introduced in the wake of that report. See *1977 Senate Judiciary Committee Hearings*, *supra*. During the hearings, Senator Kennedy stressed the importance "of a sentencing commission, which, hopefully, will report back to the Congress with [sentencing] guidelines for various federal crimes." *Id.* at 8578-79. The sentencing reform bill (S. 1437) was reported out of the Senate Judiciary Committee and was overwhelmingly passed by the Senate on January 30, 1978. S. Rep. No. 225, *supra*, at 37.

This sentencing guidelines legislation was carried forward and further refined in the next two Congresses, see S. 1722, 96th Cong., 1st Sess. § 125 (1979); S. 1630, 97th Cong., 1st Sess. § 125 (1981), and reported to the Senate floor with the nearly unanimous support of the Judiciary Committee. The proposals were endorsed by the Attorney General's Task Force on Violent Crime and were included in S. 2572, 97th Cong., 2d Sess. (1982), which passed the Senate on September 30, 1982, by a vote of 95 to 1. S. Rep. No. 225, *supra*, at 37. During this period, similar legislation was reported out of the House Judiciary Committee, see H.R. 6915, *reported by* H.R. Rep. No. 1396, 96th Cong., 2d Sess. (1980), but a stalemate over comprehensive reform of the criminal code prevented passage of the sentencing guidelines law.

In 1983, an even stronger bipartisan consensus emerged on the pending sentencing reform bills. On March 3, 1983, Senator Kennedy introduced S. 668—entitled the "Sentencing Reform Act of 1983"—which was co-sponsored by Senators Thurmond, Biden, Laxalt, Baucus, DeConcini, Hatch, Leahy, Metzenbaum, Simpson, Specter, Abdnor, Hawkins, Cohen, D'Amato, Chiles, Glenn, Huddleston, Lugar, Stevens, Zorinsky, Moynihan, and Sasser. S. Rep. No. 225, *supra*, at 37 & n.3. In his statement introducing

S. 668 to the Senate, Senator Kennedy recounted the urgent need for a comprehensive legislative reform:

> Federal criminal sentencing is in desperate need of reform. * * *
>
> The current system is actually a nonsystem. It is unfair to the defendant, the victim, and society. It defeats the reasonable expectation of the public that a reasonable penalty will be imposed at the time of the defendant's conviction, and that a reasonable sentence actually will be served.
>
> The reforms needed to achieve a workable, rational sentencing system are neither too complicated to legislate, nor too difficult to implement. The legislation which I introduce today clearly articulates the purpose of sentencing, establishes a sentencing commission to develop guidelines for sentencing, abolishes parole, and provides for appellate review of sentences which are outside the guidelines.
>
> Federal sentencing reform has been long overdue.

S. Rep. No. 223, 98th Cong., 1st Sess. 34 (1983) (quoting 129 Cong. Rec. S2090 (daily ed. Mar. 3, 1983)).

Shortly thereafter, Senators Thurmond and Laxalt proposed S. 829 on behalf of the Reagan Administration. S. 829 was a sixteen-title bill proposing a wide-ranging overhaul of the criminal code; Title II of the bill comprised sentencing reform provisions that were essentially identical to those contained in S. 668. S. Rep. No. 225, *supra*, at 37. In addition, Senator Dole proposed a similar sentencing guidelines bill on behalf of the Judicial Conference. Five days of hearings were held on S. 668 and S. 829 (along with certain other criminal law proposals) before the Subcommittee on Criminal Law of the Senate Judiciary Committee. *Ibid.* The Senate Judiciary Committee reported two bills containing identical guidelines provisions to the Senate. See S. 668, *reported by* S. Rep. No. 223, *supra*; S. 1762, tit. II (sentencing reform), *reported by* S. Rep. No. 225, *supra*. Title II of S. 1762 was modeled on Title II of S. 829.

After extended debate, the Senate passed both bills by overwhelming majorities—91 to 1, 130 Cong. Rec. S759 (daily ed. Feb. 2, 1984), and 85 to 3, *id.* at S818-819 (same). After the House of Representatives passed similar sentencing guidelines provisions, see 130 Cong. Rec. H10130-31 (daily ed. Sept. 25, 1984); see H.R. Rep. No. 1017, *supra*, at 37 (bill "mandates the development of sentencing guidelines"); *id.* at 93-105 (discussing guidelines), the Sentencing Reform Act of 1984 was enacted as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837. President Reagan signed the bill into law on October 12, 1984—almost 20 years ago to the day that this Court is scheduled to hear oral argument in these landmark cases.

Since 1984, Congress has continued to monitor this area of law and has made revisions to the sentencing guidelines system through amendments to the 1984 Act and other legislation. Some of these amendments have been criticized on the grounds that they depart from the values of the 1984 Act. The basic challenge leveled in these cases to the operation of the sentencing guidelines, however, cuts to the core of the guidelines system established by the 1984 Act.

III. THE CENTERPIECE OF THE 1984 ACT WAS THE ADOPTION OF A COMPREHENSIVE SENTENCING GUIDELINES SYSTEM

The cornerstone of the 1984 Act—and the key to Congress's effort to eliminate "unwarranted sentencing disparity"—was the creation of "a sentencing guidelines system that is intended to treat all classes of offenses committed by all categories of offenders consistently." S. Rep. No. 225, *supra*, at 51-52; *id.* at 168 (provision calling for the creation of "a detailed set of sentencing guidelines * * * is of major significance"). The sentencing guidelines represented a compromise between adhering to the failed indeterminate

sentencing system in which judges had enjoyed essentially "unfettered sentencing discretion" (*Dorszynski*, 418 U.S. at 437) and moving to "a determinate sentencing system * * * of specific legislative sentences" (S. Rep. No. 225, *supra*, at 62) devoid of any individualized judicial consideration of the particular offender or offense characteristics. See *id.* at 78-79; *Developments in the Law*, *supra*, at 1638 ("Sentencing guidelines represent a compromise between the extremes of pure determinate and indeterminate sentencing: they guide the judge's discretion but permit some flexibility.").

The 1984 Act thus created the Sentencing Commission as an "independent commission in the judicial branch," 28 U.S.C. § 991(a), and charged it with "establish[ing] sentencing policies and practices for the Federal criminal justice system" that serve the objectives of the 1984 Act, 28 U.S.C. § 991(b)(1). Congress directed the Commission, *inter alia*, to "provide certainty and fairness" in sentencing and "avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted." 28 U.S.C. § 991(b)(1)(B). To achieve that objective, Congress directed the Sentencing Commission to promulgate sentencing "guidelines" that serve the goals of the 1984 Act, 28 U.S.C. § 994(a)(1), and to establish "sentencing range[s]" applicable "for each category of offense involving each category of defendant," 28 U.S.C. § 994(b)(1). See *Mistretta*, 488 U.S. at 374-375 (discussing the detailed nature of Congress's delegation of authority to the Sentencing Commission).

The Sentencing Commission spent more than a year canvassing U.S. sentencing practices—during which it held public hearings, convened working groups of federal judges, prosecutors, private defense attorneys, and academics, reviewed more than 500 sets of written comments that were submitted to it, and examined thousands of criminal sentence reports—in an effort to identify and assign weights to the

factors that judges had traditionally used in sentencing. See 28 U.S.C. § 994(m); U.S. Sentencing Comm'n, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 16-17 (1987). After publishing and receiving and reviewing written comments on two separate sets of proposed sentencing guidelines, the Commission promulgated final guidelines that went into effect on November 1, 1987. Those guidelines are continuously reviewed and revised by the Commission—which remains "fully accountable to Congress." *Mistretta*, 488 U.S. at 393-394 (The Sentencing Commission is "fully accountable to Congress, which can revoke or amend any or all of the Guidelines as it sees fit.").[4]

The sentencing guidelines system created by the 1984 Act seeks to strike a balance between two compelling policy concerns. The first is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(7). The second is the recognition that "[s]ome variation in sentencing is not only inevitable but desirable," because "each offender stands before a court as an individual, different in some ways from other offenders," and an offense of conviction "may have been committed under highly individual circumstances." S. Rep. No. 225, *supra*, at 150.

To avoid unwarranted sentence disparities, Congress directed the Sentencing Commission to establish a system of sentencing guidelines detailing the generally applicable range of punishment that is available with respect to an offense of conviction and requiring judges to sentence defendants pursuant to those guidelines "unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing

[4] Congress has periodically exercised that authority, including recently, through certain provisions of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, § 401(b), (g), and (*i*), 117 Stat. 668-669, 671-673 (Apr. 30, 2003).

Commission in formulating the guidelines and that should result in a [different] sentence." 18 U.S.C. § 3553(b) (1986). Congress "expected that most sentences will fall *within* the ranges recommended in the sentencing guidelines," but also stressed that "the sentencing judge has an obligation to consider all the relevant factors in a case and to impose a sentence *outside* the guidelines in an appropriate case," S. Rep. No. 225, *supra*, at 52, 150 (emphases added).

To ensure that the sentencing guidelines do not foreclose "thoughtful imposition of individualized sentences," S. Rep. No. 225, *supra*, at 52, Congress not only permitted departures from the guidelines in extraordinary situations, but more fundamentally, stressed that, "[u]nder a sentencing guidelines system, the judge is directed to impose sentence after a comprehensive examination of the characteristics of the particular offense and the particular offender." *Id.* at 53. The 1984 Act accordingly specifies numerous factors that "[t]he court, in determining the particular sentence to be imposed, shall consider," including "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. §§ 3553(a) and (a)(1).

The Senate Judiciary Committee elaborated as follows:

> [T]he judge must consider such things as the amount of harm done by the offense, whether a weapon was carried or used, whether the defendant was a lone participant in the offense or participated with others in a major or minor way, and whether there were any particular aggravating or mitigating circumstances surrounding the offense. With respect to the history and characteristics of the defendant, the judge must consider such matters as the criminal history of the defendant, as well as the nature and effect of any previous criminal sanctions. All of these considerations and others that the judge believed to be appropriate would assist him in assessing how the sentencing guidelines and policy statements should apply to the defendant.

S. Rep. No. 225, *supra*, at 75; see *id.* at 52 ("[T]he sentencing judge has an *obligation* to consider all the relevant factors in a case" before imposing a sentence) (emphasis added).

In making that determination, the sentencing judge is not limited to facts found by a jury or contained in a plea agreement, but rather is directed to consider the same type of information that judges have traditionally relied on in making sentencing determinations, including, perhaps foremost, "a presentence report that notes the presence or absence of each relevant offense and offender characteristics." S. Rep. No. 225, *supra*, at 53. Indeed, the 1984 Act recodified the general rule that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purposes of imposing an appropriate sentence." 18 U.S.C. § 3661; see U.S. Sentencing Guideline § 1B1.4 cmt.; *United States* v. *Watts*, 519 U.S. 148, 151-152 (1997) (per curiam). Unlike the prior indeterminate sentencing scheme, however, the sentencing guidelines *channel* the manner in which the sentencing court may make sentencing decisions based on such information in order to avoid the intolerable disparities that plagued the indeterminate sentencing regime, and limit the degree to which a judge may depart upward or downward within a sentencing range based on such information.

At the same time, Congress specifically directed the Commission to "assure that the guidelines * * * are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders." 28 U.S.C. § 994(d). The Senate Judiciary Committee "added th[at] provision to make it absolutely clear that it was not the purpose of the list of offender characteristics set forth in [the Act] to suggest in any way that the Committee believed that it might be appropriate, for example, to afford preferential treatment to defendants of a particular race or religion or level of affluence." S. Rep. No. 225, *supra*, at 171. The sentencing guidelines

thus explicitly state that "Race, Sex, National Origin, Creed, Religion, and Socio-economic status * * * are *not* relevant in the determination of a sentence." U.S. Sentencing Guidelines § 5H1.10 (emphasis added). As an additional check to ensure that sentencing determinations are not based on such illegitimate considerations, courts are required to give written reasons for their sentencing decisions. See 18 U.S.C. § 3553(c); S. Rep. No. 225, *supra*, at 79-80; see also *Developments in the Law*, *supra*, at 1641 ("sentencing guidelines * * * place institutional checks on invidious discrimination").

Thus, while the 1984 Act sought to channel the discretion of sentencing judges in order to assure greater fairness and equality in sentencing, the Act nonetheless sought to preserve the traditional discretion that the sentencing judges have exercised to consider background information that they deem relevant to their sentencing decision. See *supra* at 8. As the Judiciary Committee stressed, "[t]he purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences" based on "a comprehensive examination of the particular offense and the particular offender." S. Rep. No. 225, *supra*, at 52-53. The ranges set by the guidelines establish a *structure* designed to avoid unwarranted disparities, but the guidelines permit sentencing judges to *individualize* sentences within those ranges by adjusting sentences both upward and downward based on particular offense and offender characteristics.

All sentences imposed under the guidelines, however, ultimately must conform to the minimum and maximum punishments prescribed by Congress and set forth in the United States Code. See U.S. Sentencing Guidelines § 5G1.1. Nothing in the 1984 Act or the sentencing guidelines authorizes the imposition of a sentence for an offense of conviction that deviates from a statutory maximum or minimum set by Congress for a particular offense.

IV. THE SENTENCING GUIDELINES WERE INTENDED TO OPERATE AS AN INTEGRATED SYSTEM OF CALIBRATIONS AND BASED ON JUDGE-MADE DETERMINATIONS

Congress intended the federal sentencing guidelines to be applied as a cohesive and integrated whole. As Congress made clear in enacting the 1984 Act, the sentencing guidelines system reflected a "comprehensive plan" to reform sentencing. S. Rep. No. 225, *supra*, at 46; see *id.* at 150 (1984 Act introduced a "systematized sentencing system"). The 1,000-plus page *Federal Sentencing Guidelines Manual* that implements the 1984 legislation amply demonstrates the "comprehensive" nature of the sentencing guidelines system that Congress created. Moreover, as the various charts and sentencing table contained in the *Manual* underscore, the sentencing guidelines establish an interlocking system of calculations and adjustments that are part of a single sentencing equation. See S. Rep. No. 225, *supra*, at 168 ("The result [of Commission's determinations] should be a complete set of guidelines that covers in one manner or another all important variations that commonly may be expected in criminal cases, and that reliably breaks cases into their relevant components and assures consistent and fair results."). The sentencing guidelines are explicitly predicated on that comprehensive approach. See U.S. Sentencing Guidelines § 1B1.11 ("The Guidelines Manual in effect on a particular date shall be applied *in its entirety*.") (emphasis added).

Attempting to apply the sentencing guidelines in a piecemeal fashion not only would be inconsistent with the "systematized sentencing system" (S. Rep. No. 225, *supra*, at 150) that Congress intended to create, but would upset the many compromises struck in fashioning the guidelines. As Justice Breyer has explained, the sentencing guidelines are the product of numerous compromises that balance "the practical needs of administration, institutional considerations, and the competing goals of a criminal justice system." Hon.

Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra 1, 2 (1988); see *id.* at 28 ("The Guidelines create a final set of compromises concerning the problems endemic to the criminal justice system."); *id.* at 32 ("[W]hile it may be possible to focus on a *single* aspect of the current Sentencing Guidelines and suggest ways to improve upon them, such an enterprise may be unproductive unless it properly accounts for the changes that would result *elsewhere in the system*.") (emphasis added). Indeed, as Justice Breyer has detailed, "compromise * * * permeates the Guidelines." *Id.* at 2.

In particular, the Congress that enacted the 1984 Act did not conceive of—much less establish—a sentencing guidelines system in which sentencing judges were free to consider facts or circumstances not found by a jury or admitted in a plea agreement for the purpose of adjusting a base-offense level *down*, but not *up*, within the applicable guidelines range. Such a one-way lever would be grossly at odds with Congress's intent. In establishing the guidelines system, Congress made clear that a sentencing judge should take into account aggravating *as well as* mitigating factors. See 28 U.S.C. § 994(c)(2) (directing the Sentencing Commission to consider "the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense"); S. Rep. No. 225, *supra*, at 74 (The Act "requires the court to impose sentence within the sentencing guidelines unless an aggravating or mitigating circumstance exists that was not adequately considered in the formulation of the guidelines and that should result in a different sentence.").

Moreover, such a one-sided system would conflict with Congress's objective of ensuring that the sentences produced under the guidelines system would be "fair both to the offender *and* to society." S. Rep. No. 225, *supra*, at 39 (emphasis added); *id.* at 45-46 ("a sentence that is unjustifiably low is * * * unfair to the public"). And, to the extent that the base-offense level could be adjusted in only one direction—downward—based on individual or offense characteristics found by a judge, the guidelines would transgress Congress's intention of "actually *enhanc[ing]* the individualization of sentences as compared to current law." *Id.* at 52-53 (emphasis added). Permitting sentencing judges to consider specific offender or offense characteristics not found by a jury to reduce a sentence—but not enhance it—would produce sentences that do not reflect a full and accurate profile of the individual before the court and, therefore, are not based on a proper evaluation of the "fairness and appropriateness of the sentence for [that] offender." *Ibid.*

Subjecting the enhancement side of the guidelines equation to a jury-factfinding or plea-admission requirement also would fundamentally upset the scheme that Congress enacted. To begin with, the 1984 Act specifies that the sentencing guidelines are "for use *of a sentencing court* in determining the sentence to be imposed in a criminal case." 28 U.S.C. § 994(a)(1) (emphasis added); see U.S. Sentencing Guidelines § 6A1.3(b) cmt. Moreover, Congress intended that the findings necessary for the operation of the guidelines typically would be made by the court in performing that sentencing role. Indeed, in reporting the Act to the Senate, the Judiciary Committee observed that "*the sentencing judge* has an *obligation* to consider all the relevant factors in a case" before imposing a sentence. S. Rep. No. 225, *supra*, at 52 (emphases added). See *ibid.* ("The bill requires the judge, before imposing sentence, to consider the history and characteristics of the offender, the nature and circumstances of the offense, and the purposes of sentencing."); *id.* at 53 ("Under a sentencing guidelines system, the judge is directed to impose sentence after a comprehensive examination of the characteristics of the particular offense and the particular offender."); *id.* at 75 (discussing the myriad of "factors a judge is required to consider in selecting the sentence").

Furthermore, attempting to substitute a jury for the sentencing judge in applying the sentencing guidelines—even just

for purposes of finding facts that could result in sentencing enhancements—would require consideration of a number of potentially serious practical issues. For example, new rules might be required to bifurcate previously routine criminal trials into a guilt phase and a sentencing phase, complex new jury instructions might be required to cover the lexicon of specialized guidelines terms and concepts that would now have to be considered by a jury in evaluating sentencing factors, and elaborate special verdicts might become necessary. See *2004* Blakely *Hearings*, *supra* (statement of Prof. Frank Bowman) (available at http://judiciary.senate.gov/testimony.cfm?id =1260&wit_id=647). All of this could revamp the ordinary federal criminal trial, create a host of new and complex legal issues for the courts, and place a significant if not potentially crippling practical and financial drain on the federal criminal justice system. At a bare minimum, such a possibly far-reaching and costly overhaul of the federal criminal process should come only from the hand of Congress. In enacting the 1984 Act, there is no evidence that Congress considered any such consequences.[5]

But that is not surprising. In enacting the 1984 Act, Congress had no intention of shifting the responsibility for imposing sentence—including the responsibility for making the sorts of myriad factual determinations that judges have for centuries made in the course of imposing sentence—from sentencing judges to sentencing *juries*. To the contrary, as this Court aptly observed in its first exposure to the 1984 Act, the sentencing guidelines "do no more than fetter the discretion of sentencing judges to do what they have done for

[5] Indeed, although Congress took care to amend specific provisions of the Federal Rules of Criminal Procedure "in order to accord with the provisions [of the 1984 Act]," S. Rep. No. 225, *supra*, at 157-158 (discussing provisions providing for the appellate review of sentences), Congress did not alter the federal rules governing the use of juries in federal criminal trials.

generations—impose sentences within the broad limits established by Congress." *Mistretta*, 488 U.S. at 396.[6]

* * * * *

Determining the appropriate scope of punishment for an offense is one of the most complex areas of criminal law. It is the product of a delicate—and at times potentially volatile—mix of policy, practical, and societal considerations. It is, in short, an area uniquely suited for legislative consideration and compromise. The 1984 Act is the result of the most careful examination that Congress and, indeed, all three Branches collectively have ever devoted to the federal sentencing system. The Act sought to eliminate the gross disparities that had proliferated under the prior indeterminate sentencing system—disparities that in at least some cases were believed to stem from the improper consideration of race and other illegitimate factors. Nearly two decades later, debate is ongoing in the Halls of Congress and the other Branches on ways of improving the sentencing system, but—especially when viewed against the backdrop of the intolerable state of affairs that existed before 1984—bipartisan support continues to exist for the basic structure of the sentencing guidelines system created by the 1984 Act and the

[6] The understanding that judges—and not juries—would engage in the factfinding necessary to administer the guidelines was reaffirmed before the initial set of guidelines went into effect on November 1, 1987. In House subcommittee hearings, witnesses discussed that the guidelines would call for judicial factfinding, by a preponderance of the evidence, to resolve contested issues at sentencing, and debated the effect on judicial efficiency and fairness. See *Sentencing Guidelines: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 659, 799 (1987). But there was no suggestion that the guidelines would be administered through jury factfinding, and no legislation adopted to provide for it, even though one witness suggested that Congress should consider it. See *id.* at 814 n.3 (testimony of Judge Edward R. Becker) ("commend[ing] to the Congress' attention the use of the jury to make critical fact findings that bear upon sentencing").

core principles on which it rests. In our representative Republic, only the clearest constitutional command should be cause for dismantling such a considered legislative effort.

CONCLUSION

For the foregoing reasons, amici respectfully urge this Court to give effect to Congress's intent in enacting the 1984 Act and sustain the continued application of the federal sentencing guidelines as a cohesive and integrated whole.

Respectfully submitted,

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(16) (17)

No. 04-105, 04-104

Supreme Court, U.S.
FILED
SEP 21 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

United States,
Petitioner,

v.

Freddie J. Booker,
Respondent.

United States,
Petitioner,

v.

Ducan Fanfan,
Respondent.

On Writ of Certiorari to the United States Courts of Appeals
for the First and Seventh Circuits

BRIEF *AMICUS CURIAE* OF THOMAS F. LIOTTI, ESQ. IN SUPPORT OF RESPONDENTS

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September 21, 2004

QUESTIONS PRESENTED

1. Whether a District Court violates the Fifth and Sixth Amendments by relying upon facts that increase the maximum sentence available under the United States Sentencing Guidelines (other than the fact of a prior conviction) when those facts were not charged in the indictment and either found by the jury on proof beyond a reasonable doubt or admitted by the defendant.

2. If the answer to the first question is "yes," the following question is presented: What role do the Sentencing Reform Act, the Sentencing Guidelines, and Federal Rule of Criminal Procedure 32 continue to play in federal criminal sentencing?

TABLE OF CONTENTS

QUESTIONS PRESENTED.....ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES.....iv

BRIEF OF *AMICUS CURIAE*
THOMAS F. LIOTTI, ESQ.....1

INTERESTS OF *AMICUS CURIAE*.....1

STATUTES INVOLVED.....6

SUMMARY OF ARGUMENT.....6

ARGUMENT.....6

I. Under *Blakely*, the Federal Sentencing Guidelines Violate the Sixth Amendment.....6

A. The Sixth Amendment Protects Against Encroachments on the Right to Jury Trial by Any Branch of Government.....9

1. Congress Controls the Guidelines Through its Enactment of Mandatory Minimum Sentences.....9

II. The Sentencing Reform Act, Guidelines and Federal Rule of Criminal Procedure 32 are all Unconstitutional as Presently Applied.....11

CONCLUSION.....15

TABLE OF AUTHORITIES

Page

CASES

Apprendi v. New Jersey,
530 U.S. 466, 120 S.Ct. 2348 (2000) 4

Blakely v. Washington,
124 S.Ct. 2531, 2004 U.S. LEXIS 4573 4

Crawford v. Washington,
124 S.Ct. 1354, 158 L.Ed2d 177 (2004) . . . . .9(n.8)

Jenkins v. Coombe,
821 F. 2d 158 (1987) . . . . . .2(n.2)

State of Alabama v. Shelton,
122 S. Ct. 1764 (2002) . . . . . 3(n.4)

U.S. v. Fatico,
603 F.2d 1053 (1979) . . . . . 8(n.8)

U.S. v. Leach,
USDC ED PA. CR. No. 02-172-14,
2004 U.S. Dist. LEXIS 13291 . . . . . 4(n.6)

U.S. v. Moises,
2001 WL 563469 (SDNY) 7

U.S. v. Rojas,
CR-03-14-1 (Dalzell, J.) . . . . . .4(n.6)

STATUTES

18 U.S.C. § 924(c) 9

18 U.S.C. § 3553(e) 10

18 U.S.C. § 3742 6

21 U.S.C. 841 9

Sentencing Reform Act of 1984,
28 U.S.C. § 994(h) . . . . . 5(n.7)

28 U.S.C. § 994(a) 6

U.S. CONSTITUTION

Sixth Amendment 9

OTHER

Thomas F. Liotti, *Departing From the Federal Sentencing Guidelines*, The Verdict, July, 1998 at 1 through 13 2

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Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 14-SPG Crim. Justice 28, 33 (1999) 11

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Deborah Pines, *Ten Years Later, Federal Sentencing Guidelines Go Down Easier, Seen As Allowing Judges More Flexibility Than Anticipated*, New York Law Journal, November 3, 1997 at 1, 6 and 7 13

BRIEF OF *AMICUS CURIAE* THOMAS F. LIOTTI, ESQ.

Thomas F. Liotti, Esq. files this *amicus curiae* brief pursuant to this Court's Rule 37.3(a) in support of respondents Freddie J. Booker (No. 04-104) and Duncan Fanfan (No. 04-105) assertion of rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution. Both petitioner and respondents have granted *amicus* consent to file this brief, and letters of consent have been filed with the Clerk of this Court.[1]

INTEREST OF *AMICUS CURIAE*

This *amicus curiae* counsel has been practicing for more than 27 years. My practice has been devoted to litigation, trials and appeals in State and Federal Courts. I am a Past President of the Columbian Lawyers' Association of Nassau County; the Criminal Courts Bar Association of Nassau County

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[1] No counsel for any party to this case authored this brief in whole or in part, and no person or entity, made any monetary contribution to its preparation or submission. *Amicus curiae* appears in this case *pro bono publico*, entirely at his own cost and expense. See Rule 37.6. The petitioner and respondent have consented to the filing of this brief, and amicus has filed the letters of consent with the Clerk of the Court. pursuant to Rule 37.3(a). This *amicus curiae* requested the aforesaid consent of counsel on or about August 27, 2004 but did not receive consent until very late in the afternoon of September 20, 2004, less than 24 hours prior to the filing deadline for this brief, to wit: September 21, 2004 at or before 3 p.m. *Amicus curiae* is honored to receive the consent of all counsel and will labor through the night to meet the Court's filing deadline since I have assured my esteemed colleagues that I will do so. This Court has scheduled an expedited appeal in this case where oral arguments will be heard on October 4, 2004, the first day of the Court's 2004-2005 session and calendar.

(Founded in 1953); the New York State Association of Criminal Defense Lawyers and the Immediate Past Chair of the New York State Bar Association Criminal Justice Section. I am also a Life Member of the National Association of Criminal Defense Lawyers (Founded in 1958) and a Fellow in the American Board of Criminal Lawyers. I have been a member of this Court's Bar since January 19, 1988. I have never been a prosecutor, but I have been a part-time Village Justice in Westbury, New York for thirteen and one-half years. I am a former member of the Criminal Justice Act Panels in the Southern District of New York and the Eastern District of New York. I remain a member of the Criminal Justice Act Panel for the Second Circuit Court of Appeals. In my years of practice I have represented thousands of defendants and tried in excess of one hundred felony, jury trials. I have argued in excess of one hundred appeals in State and Federal Courts. My cases have been cited *with favor* by this Court.[2]

In the aforementioned capacities, *amicus curiae* counsel's name appears as the attorney of record in several hundred reported decisions. He has authored over one hundred legal articles[3] and published more legal opinions than any other Village or Town Justice within the State of New York. He has co-authored three books, all dealing with the subject of criminal law. *Amicus curiae* has lectured before a great many bar associations and law schools on a variety of subjects concerning the criminal law, including sentencing issues.

In 2002 I was privileged to successfully co-author an

[2] See Jenkins v. Coombe, 821 F. 2d 158 (1987).

[3] See *eg.* Thomas F. Liotti, Departing From The Federal Sentencing Guidelines, The Verdict, July, 1998 at 1 through 13.

amicus curiae brief[4] before this Court with distinguished counsel and Professor Steven Duke of the Yale Law School, Professor Adriaan Lanni of Harvard University and David M. Porter, Esq. on behalf of the National Association of Criminal Defense Lawyers.[5] Professor Duke was asked by the Court to argue the brief before it.

While *amicus curiae* counsel does not represent an organization and his views herein are not offered on behalf of an organization, he nonetheless verily believes that his views are those of a great many lawyers and Judges. Indeed many of our esteemed Judges in New York have protested the existence of the Guidelines. One of our Judges in the Southern District of New York actually resigned his seat on the Bench, in part due to his frustration at having to sentence people under the arcane, technical and anti-human guidelines. Quite simply, since the enactment of the Federal Sentencing Guidelines on November 1, 1987, Judges, juries and advocates (except prosecutors) have all been denuded of their functions. Juries do not participate in sentencing; Judges are sworn to follow the Federal Sentencing Guidelines and their departures are now questioned. In the last 25 years penalties and sentences are more severe, there are fewer and fewer trials, more defendants cooperate and prosecutors decide who will be permitted to cooperate, what sentences will be and the extent to which anyone receives credit for their cooperation. While the Federal

[4] State of Alabama v. Shelton, 122 S.Ct. 1764 (2002).

[5] Professor Lanni and Mr. Porter were Of Counsel on that brief. Professor Duke and this *amicus curiae* wrote the brief. This *amicus curiae*'s Law Review article was referred to therein. See Thomas F. Liotti, Does Gideon Still Make A Difference?, 2 N.Y.C.L. Rev. 105 (1998).

Sentencing Guidelines may have had a laudable purpose when its authors attempted to mete out disparities in sentencing by their implementation, the Guidelines have become a hodgepodge, a veritable Frankenstein monster of disjointed parts. The uniqueness of individuals and cases has been consigned to a conveyor belt to our federal penitentiaries.

Incredibly today nearly all defendants are compelled to plead guilty to felony charges and then go to jail. There is little in the way of real plea bargaining because federal prosecutors have the weapon of the Federal Sentencing Guidelines in their already overpowering arsenal. All of this one sidedness is bringing us closer and closer to a tyranny, something our Founders feared when they established this great Republic, providing for a Bill of Rights and trial by juries.

In this case *amicus curiae* clients, past, present and future all have interests that may be affected by the outcome of the decision in this case. Following this Court's learned opinions in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000) and Blakeley v. Washington, 124 S.Ct. 2531, 2004 U.S. LEXIS 4573, Judges and lawyers across the land have attempted to interpret the Court's decisions. Some have said that the Guidelines are unconstitutional[6] while others have said that they are. Still others have taken no position and adjourned all sentences until after this Court decides the extant appeals.

This *amicus curiae* takes these extraordinary measures

[6] See U.S. v. Leach, USDC ED PA. Cr. No. 02-172-14, 2004 U.S. Dist. LEXIS 13291 (Dalzell, J., 7/12/04). In U.S. v. Rojas, CR-03-14-1, Judge Dalzell imposed a statutory minimum of ten years after the Government conceded the defendant's minimum role, thus obviating the application of departure under the Federal Sentencing Guidelines.

to stand against the tyranny that has become the Federal Sentencing Guidelines. *Amicus curiae* urges the Court to harken back to a time when sentencing was not controlled by grids, levels, categories and points, but concerned itself with human beings, defendants and victims. We may live in a technical, computer age but we should fight against the replacement of our human spirit with mechanized sentencing. We are not yet a nation of robots and automatons. We should never become one.

Under our current system of sentencing Judges are hard pressed to reflect upon their life experience or to apply same at sentencings. Lawyers have lost their roles as advocates, instead they are victims of the Guidelines. It is not surprising that the United States Sentencing Commission has filed an *amicus curiae* brief seeking to preserve the *status quo* and themselves. The Sentencing Commission has become an arm of the prosecution or nearly a fourth branch of government. In the 20 years of their existence they have arrogated more and more power to themselves. If we do not stop now, then in our lifetimes computers will supersede the judicial, jury and lawyer functions. Computers will tell us if a burden of proof has been met. They will quantify guilt or innocence, naturally favoring cold, hard facts and guilt in most cases. This Court has the power to stop the accentuation away from the Bill of Rights and to take us "back to the future", back to pre-November 1, 1987.[7] This *amicus curiae* believes that his advocacy or dialogue at sentencing proceedings are analogous to the movie scenes between Hal, the computer and Dave, the human in 2001 A

[7] The Court should re-visit and strike down the Sentencing Reform Act of 1984 (28 U.S.C. § 994(h)). To adhere to *stare decisis* under these circumstances would be, as Emerson wrote: "A foolish consistency is the hobgoblin of little minds."

Space Odyssey.

Not incredibly, the states are beginning to replicate the Federal Sentencing Guidelines. The denuding of the judiciary, the advocates and juries has begun in state courts as well. The Guidelines are no longer what they promised to be. They are not Guidelines at all. They are extremely rigid and their application is not discretionary but rather, mandatory. Departures may be appealed but a failure to depart is not. 28 U.S.C. § 994(a) *et. seq.* and 18 U.S.C. § 3742.

STATUTES INVOLVED

The Federal Sentencing Guidelines as promulgated by the United States Sentencing Commission created pursuant to the Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984). 28 U.S.C. § 994(a).

SUMMARY OF ARGUMENT

It is improper for Judges or prosecutors to decide questions of fact that are the sole and exclusive province of the jury. Elements of crimes and enhancement provisions of the Guidelines should be decided by juries, the Judges of the facts.

A Federal District Court violates the Fifth and Sixth Amendment rights of a criminal defendant when it relies on facts not charged in the indictment, and not found by a jury beyond a reasonable doubt, nor admitted by the defendant, to increase the maximum sentence dictated by the United States Sentencing Guidelines (Guidelines).

The right of a criminal defendant to trial by jury is

enshrined in Constitutional provisions and cannot be infringed by actions of the federal government by they legislative, judicial, executive or delegated administrative functions.

The second question presented by these cases addresses the consequence of a determination by this Court that the Guidelines are subject to the holding of *Blakely*.

This Court should hold that, in the interim, sentencing will follow the process *already employed* by the Department of Justice. The government will allege in indictments those facts that give rise to enhanced sentences under a revised Guideline. In those few cases that do not result in a plea bargain, the same jury that determined guilt will decide the facts relevant to the enhancement in a bifurcated proceeding under the traditional "beyond a reasonable doubt" standard, much as what presently occurs in some capital cases. The jury would itself have no sentencing authority. Judges instead would exercise their discretion to impose sentences in the range determined by the Guideline provisions applicable to the facts found by the jury.

ARGUMENT

I. Under *Blakely*, the Federal Sentencing Guidelines Violate the Sixth Amendment

In United States v. Juan Moises, 2001 WL 563469 (SDNY) Hon. William Pauley, Court Follows 'Apprendi v. New Jersey' In Preparing To Determine Proper Sentence and New York Law Journal, June 13, 2001 at 24, col. 5, the Court granted a so-called *Apprendi* motion because it informed jurors during the trial to ignore issues relating to weight of drugs in a drug conspiracy trial. In applying *Apprendi* the Court reasoned that the statute called for proof of an element of the crime,

namely: ". . . the intent to distribute five or more kilograms of cocaine. . ." yet that function was taken away from them by the Court. As a result the Court computed the defendant's sentence on the basis of its computations under the Guidelines, to wit: Level 43. It did so on the basis of enhancements contained in the Guidelines including its finding that the defendant lied under oath when he testified during the trial. Absurdly, the Court reasoned that the defendant testified and the jury convicted him. Therefore, the Court erroneously concluded that the defendant must have been lying under oath when he testified. This was a conclusory finding by the Court of perjury which allowed it to enhance the defendant's sentence. In addition, the Court determined that the quantity of drugs involve was in excess of 900 kilograms. Neither of these factors were determined by a jury with proof beyond a reasonable doubt. Yet, they were *ratio decidendi* for sentencing the defendant to the maximum term of imprisonment of 20 years in prison.[8]

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[8] It should be noted that Judge Pauley made this determination on the basis of the fact that he was the Trial Judge and heard the evidence. He drew his conclusions by a preponderance of the evidence but never said so and did not make findings of fact on the record. In New York, a *Fatico* hearing would have been meaningless in terms of changing this outcome because Judge Pauley was the trial judge and the outcome of a *Fatico* hearing would also be governed by the inadequate standard of proof by a preponderance of the evidence instead of proof beyond a reasonable doubt. See U.S. v. Fatico, 603 F.2d 1053 (1979). Remarkably *Moises* also had to contend with the problem of not being afforded his right to cross-examine during the trial when hearsay statements, plea allocutions and sworn statements from co-conspirators were received into evidence over objection. See Crawford v. Washington, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004). See also Thomas F. Liotti, A War On Drugs: At What Cost To Our Liberty?, Perspective, New York Law Journal, February 28, 1990 at 2 and The Nassau Lawyer, April, 1990 at 2.

A. The Sixth Amendment Protects Against Encroachments on the Right to Jury Trial by Any Branch of Government

The government's singular focus on what it views as the judicial character of the Guidelines completely misses the mark. The right of an accused" to trial by jury is protected in our Constitution twice - in Article III, § 2, cl. 3, and in the Sixth Amendment. The placement of this core constitutional right in the Bill of Rights, rather than in Article I, shows that it makes no difference whether the Guidelines are "legislative" or "judicial" in character. The discussion of jury trials in Article III demonstrates that the Judicial Branch, in particular, is charged with protecting that right.

1. Congress Controls the Guidelines Through its Enactment of Mandatory Minimum Sentences

Congress has repeatedly enacted mandatory minimum sentences that supersede the otherwise applicable Guideline ranges. Mandatory minimums control a sentence regardless of the appropriate Guidelines range for the offense. See, *e.g.* 21 U.S.C. 841 (mandatory minimums for manufacture or distribution of controlled substances); 18 U.S.C. 924(c) (mandatory minimums for use of a firearm in the commission of a crime of violence or drug trafficking crime).[9] Such

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[9] There are dozens more such mandatory minimum provisions in the federal code. Ian Weinstein, *Fifteen Years After The Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 Am. Crim. L. Rev. 87, 99 & n.56 (2003) (citing U.S. Sentencing Comm'n, Special Report to Congress: Mandatory Minimum Penalties in the Criminal Justice System (1991)).

congressionally mandated minimums thus "prevent the commission from carrying out its basic, congressionally mandated task: the development, in part through research, of a rational, coherent set of punishments." Justice Breyer, 14-SPG at 33; see generally U.S. Sentencing Comm'n, *Special Report to Congress: Mandatory Minimum Penalties in the Criminal Justice System* (1991). They also "transfer sentencing power from the courts to the prosecution" by precluding a District Court from departing below the mandatory minimum except on the request of the prosecution. Mandatory Minimum Penalties, at iii; see 18 U.S.C. 3553(e).[10]

In short, mandatory minimums "skew the entire set of criminal punishments, for Congress rarely considers more than the criminal behavior directly at issue when it writes these provisions". Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 14-SPG Crim. Justice 28, 33 (1999). When a court sentences in a case involving a mandatory minimum that exceeds the applicable Guidelines range, it has no discretion at all, but rather must sentence exactly at the statutory minimum, so as to come as close as possible to satisfying the Guidelines without violating the conflicting statute. The fact that Congress can and perpetually does impose this kind of distortion further demonstrates that sentencing under the Guidelines operates pursuant to a

[10] *See also* The Hon. Anthony M. Kennedy, Address to the American Bar Association (Aug. 9, 2003) http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html ("Under the federal mandatory minimum statutes a sentence can be mitigated by a prosecutorial decision not to charge certain counts. There is a debate about this, but in my view a transfer of sentencing discretion from a judge to an Assistant U.S. Attorney, often not much older than the defendant, is misguided . . . Most of the sentencing discretion should be with the judge, not the prosecutors.").

legislative scheme, not a judicial one.

II. The Sentencing Reform Act, Guidelines and Federal Rule of Criminal Procedure 32 are all Unconstitutional as Presently Applied

In answering the second question presented, this Court should reject the government's argument that the District Courts should treat the Guidelines as merely "advisory," a proposal that both lacks any internal coherence and runs contrary to Congress's principal goal of producing sentencing uniformity. The Court should instead require sentence-enhancing facts to be alleged in the indictment and proved beyond a reasonable doubt to the jury in a bifurcated sentencing hearing. Under this system, the jury would not act as a "sentencing jury" - *i.e.*, it would not actually "select an appropriate sentence from within a statutory range of punishment" (Nancy J. King & Roosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 Vand. L. Rev. 885, 886 (2004) - but instead would simply find the relevant facts. The judge would then determine an appropriate sentence within the applicable Guidelines range.

From 1987 through 2000 there have been no fewer than six amendments to the Federal Sentencing Guidelines. Each year the Federal Sentencing bureaucracy grows and concomitantly so does the Bureau of Prisons. The power of the judiciary becomes less and less.[11] According to the Department of Justice, there are now over one hundred federal prisons and nearly five million people incarcerated including those in post

[11] See Daniel Wise, Justice Department Directive Curtails Prison Bureau Practice, Dozens of Inmates Seek to Preserve Assignments to Halfway Houses, New York Law Journal, January 31, 2003 at 1 and 3

release status. This tragedy for our society shows that one person in every two hundred eighty is in jail and that we have turned from being a nation that aspired to rehabilitation and redemption to one that favors retribution and dire punishment instead. The Federal Sentencing Guidelines are becoming more like Draco's Ancient Grecian Penal Code, byzantine in character and complexity, so that those accused of crimes have little understanding of the punishments they face. Only the elite members of our society, the Judges, the lawyers and Probation have access and understanding of the Guidelines. Today one must have the Rosetta Stone to understand the hieroglyphics that have become the Guidelines.

Prior to November 1, 1987 lawyers would review the pre-sentence report of their clients; prepare memoranda and have oral argument on the day of sentencing. Those arguments would typically include legal matters as well as psycho-social issues. Today computers and the Guidelines do all of our thinking for us. They help us to calculate. The Guidelines are a science reserved for the elite members of our society. We file objections and on the day of sentencing there is some discourse about base levels, criminal history, etc., all leading to a mathematical calculation which metes out a finite sentence for anyone and everyone fitting that criteria. There is no meshing of psychology or social science with the law. Indeed there is no psychological testing routinely done of defendants facing sentencing. It is a case of "one size fits all." Individuality and uniqueness are things of the past. When it comes to federal sentencing everyone has the same D.N.A.

Some years ago a few members of the judiciary opined

that federal sentencing gave our courts "play in the joints."[12] Today those joints are badly afflicted with arthritis. Federal sentencing has become a "blood sport" for Kings with the prosecutors usually winning out over the Judiciary and defense lawyers. Armed with mandatory minimum sentences and the Guidelines, prosecutors are able to take aim at their "sitting ducks," the defense attorneys and their clients, who are nominal participants in most sentencing proceedings.

The Sixth Amendment of the United States Constitution provides for speedy and public trials by jury. But, federal sentencing takes us into the dark corners of the criminal justice system, to the underbelly of it. The disparities that the Guidelines sought to cure have been exacerbated by back room deals and the infamous 5K1.1 letters that have turned our country into a nation of "rats," "snitches" and informants. We allow for the admission of hearsay in drug conspiracy cases and that too compels more and more defendants to avoid trials. Our prisons are overflowing but Correctional Officers and their unions proudly wear tee shirts with a logo and drawing of a federal prison on it. It reads: "If you build them, they will come." And come they have, at a cost to our taxpayers ($35,000 to $50,000 per inmate/annum) of untold billions of dollars. But there are alternatives. Something can be done to reverse the undisclosed, national scandal and the destruction of our Bill of Rights. Something can be done to check the unknowing and unthinking politicians who favor the anachronistic words of Alice In Wonderland's notorious Red Queen, "First off with their heads and then the trial."

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[12] Deborah Pines, Ten Years Later, Federal Sentencing Guidelines Go Down Easier, Seen As Allowing Judges More Flexibility Than Anticipated, New York Law Journal, November 3, 1997 at 1, 6 and 7.

Except for the Eighth Amendment's admonishment against "cruel and inhuman" treatment our Founders gave little consideration to sentencing. Instead they provided for by trials by jury. This they nobly believed would preserve a democratic, free, compassionate and thoughtful society. Trials by jury were preferred over trials by compurgation, The Bridge of Assize and the Crucible's Salem Witch Trials where even dogs were convicted by innuendo, speculation, rumor and the pointing of fingers.

Federal sentencing today is much like the Salem Witch Trials. The Government may offer all manner of hearsay against the accused. If a defendant has been unlucky enough to be debriefed with the zero protection that a so-called "Queen for a Day Letter" provides, then all of his admissions may be used against him at the time of sentencing. Those same letters are used to discourage defendants from testifying at their trials because their admissions may be used against them at trial.

Following debriefings and "Queen for a Day Letters," prosecutors are free to reject the defendant's proffered cooperation. Then the defendant has even less of an inducement to go to trial. He has already admitted to the crime in a proffer session, a plea bargain session that has gone awry and where the Government has decided that they do not need the defendant's help. Of course, they know everything about defendants before they sit down for a proffer session. Usually they have decided in advance whether they will give defendants proffer agreements or not. The proffer session is then unfairly used as a discovery tool by the prosecution in order to learn about defenses and whether the accused will be cross firing at fellow defendants or simply wait for the proverbial ax to fall. Blind faith in a failed system, the Government and prosecutors, are frequently the hope of cooperators only to learn to their

heartfelt dismay that their fate has already been decided by co-conspirators who arrived at the prosecutors door ahead of them or because they are not needed for the Government's case. After being rejected as a "cooperator," the lowest common denominator in the criminal justice system, what possible hope can a defendant have of succeeding at trial. The answer is none. By putting all of his or her expectations on a 5K1.1 letter, the alternatives are to take a plea without it and face mandatory minimum sentences or go to trial where the Government is armed with everything that the defendant has told them during their debriefing sessions. The alternative of a fair trial by a jury of one's peers does not exist because it has been taken away from us by the Federal Sentencing Guidelines. The Bill of Rights and our revered Sixth Amendment have been superseded by the United States Sentencing Commission and their diabolical Guidelines.

CONCLUSION

This *amicus curiae* apologizes to Justice Breyer and the other former and present members of the United States Sentencing Commission for being critical of their well intentioned work product. Yet, much as Lenin may not have foreseen the creation of what famed Russian writer Aleksandr I. Solzhenitsyn referred to as The Gulag Archipelago, so too it must be that the United States Sentencing Commission had no idea of the evil that would be wrought from their efforts.

Respectfully submitted,

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(16) (15)

Nos. 04-104 and 04-105

Supreme Court, U.S.
FILED
SEP 21 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

United States, *Petitioner*,

v.

Freddie J. Booker.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

United States, *Petitioner*,

v.

Ducan Fanfan.

On Writ of Certiorari Before Judgment
to the United States Court of Appeals
for the First Circuit

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TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
INTEREST OF *AMICUS CURIAE* 1
SUMMARY OF THE ARGUMENT 1
I. Under *Blakely*, the Federal Sentencing Guidelines Violate The Sixth Amendment. 4
A. The Sixth Amendment Protects Against Encroachments on the Right to Jury Trial by Any Branch of Government. 5
B. The Federal Sentencing Guidelines Establish Mandatory Legislative Rules. 6
C. Congress Has Repeatedly Exercised Broad Control Over the Guidelines. 7
D. The Commission Does Not Express the Collective Voice of Individual Sentencing Judges 16
II. Federal Sentencing Practices Can Be Adapted To The Requirements Of The Sixth Amendment Without Eliminating The Binding Effect Of The Federal Guidelines That Congress Deemed Essential To Reduce Sentencing Disparities. 18
A. The Government's Proposal Would Thwart the SRA's Principal Goal of Reducing Unwarranted Sentencing Disparities. 21
B. The Proper Approach Is to Require That Enhancing Facts Be Alleged in Indictments And Proved to the Jury Beyond a Reasonable Doubt 26
CONCLUSION 30

TABLE OF AUTHORITIES

Cases

Alaska Airlines, Inc. v. *Brock*, 480 U.S. 678 (1987) 27
Apprendi v. *New Jersey*, 530 U.S. 466 (2000) ..... passim
Blakely v. *Washington*, 124 S. Ct. 2531 (2004)..... passim
Blockburger v. *United States*, 284 U.S. 299 (1932) 20
Bouie v. *Columbia*, 378 U.S. 347 (1964)..... 20
Brown v. *Ohio*, 432 U.S. 161 (1977)..... 20
Bullington v. *Missouri*, 451 U.S. 430 (1981)..... 21
Denver Area Educ. Telecomm. Consortium, Inc. v. *FCC*, 518 U.S. 727 (1996)..... 27
Feltner v. *Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998)..... 29
Holmes v. *United States*, 363 F.2d 281 (CADC 1966)..... 19
Koon v. *United States*, 518 U.S. 81 (1996)..... 2, 8, 9, 10
Marks v. *United States*, 430 U.S. 188 (1977)..... 20
Melendez v. *United States*, 518 U.S. 120 (1996)..... 15
Miller v. *Florida*, 482 U.S. 423 (1987) 7, 19
Minnesota v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999)..... 19, 21
Mistretta v. *United States*, 488 U.S. 361 (1989)..... 7, 8, 12, 22
Monge v. *California*, 524 U.S. 721 (1998)..... 21
Regan v. *Time, Inc.*, 468 U.S. 641 (1984) 21
Rogers v. *Tennessee*, 532 U.S. 451 (2001)..... 20
Sattazahn v. *Pennsylvania*, 537 U.S. 101 (2003) 20
Splawn v. *California*, 431 U.S. 595 (1977) 6
State v. *Gould*, 23 P.3d 801 (Kan. 2001)..... 30
Stinson v. *United States*, 508 U.S. 36 (1993) 6
United States v. *Bell*, 991 F.2d 1445 (CA8 1993) 7
United States v. *Cotton*, 535 U.S. 625 (2002) 1
United States v. *Davern*, 937 F.2d 1041 (CA6 1991) (en banc) 6

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United States v. *Jimenez Martinez*, 83 F.3d 488 (CA1 1996) 25
United States v. *Kim*, No. 03 Cr. 413 (RPP), 2003 WL 22391190 (S.D.N.Y. Oct. 20, 2003)..... 12
United States v. *Kirsch*, 287 F. Supp. 2d 1005 (D. Minn. 2003) 11
United States v. *Mateo*, 299 F. Supp. 2d 201 (S.D.N.Y. 2004)..... 10
United States v. *Mellert*, No. CR 03-0043 MHP, 2003 WL 22025007 (N.D. Cal. July 30, 2003)..... 11
United States v. *Miele*, 989 F.2d 659 (CA3 1993) (Becker, J.)..... 25
United States v. *Robles-Torres*, 109 F.3d 83 (CA1 1997)... 25
United States v. *Sandini*, 816 F.2d 869 (CA3 1987) 19
United States v. *Schnell*, 982 F.2d 216 (CA7 1992)..... 7
United States v. *Seacott*, 15 F.3d 1380 (CA7 1994)..... 7

Statutes

18 U.S.C. 3553(a) 23
18 U.S.C. 3553(b)..... 6, 8
18 U.S.C. 3661..... 25
18 U.S.C. 924(c) 15
21 U.S.C. 841(b)(1)(A)..... 14
21 U.S.C. 841(b)(1)(B)..... 14
21 U.S.C. 841(b)(i)(B)(ii)..... 14
21 U.S.C. 841(b)(i)(B)(iii)..... 14
21 U.S.C. 850..... 25
28 U.S.C. 991(b)(1)(B)..... 8, 9
28 U.S.C. 994(f)..... 22
Kan. Stat. Ann. 21-4718(b)..... 30
Pub. L. No. 103-322, § 110501, 108 Stat. 2015 (1994)..... 13

Pub. L. No. 103-322, § 180201(c), 108 Stat. 2047 (1994) ... 13
Pub. L. No. 104-38, § 1, 109 Stat. 334 (1995) ... 14
Pub. L. No. 105-101, § 2, 111 Stat. 2202 (1997) ... 13
Pub. L. No. 107-204, § 1104(b)(5), 116 Stat. 809 (2002) ... 7, 8, 14
PROTECT Act, Pub. L. No., 108-21 § 401(n), 117 Stat. 667 (2003) ... passim
Pub. L. No. 108-21, § 104(a) ... 13
Pub. L. No. 108-21, § 401(h) ... 10
Pub. L. No. 108-21, § 401(m)(2)(A) ... 10

Other Authorities

130 CONG. REC. 976 (1984) ... 26
1995-2002 U.S. Sentencing Comm'n Ann. Reps., *at* http://www.ussc.gov/ANNRPT/1999/ar99toc.htm ... 17
1995-2002 U.S. Sentencing Comm'n Annual Reports and Statistical Sourcebook, *at* http://www.ussc.gov/annrpts.htm (last visited Sept. 18, 2004) ... 17
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U.S. Sentencing Comm'n, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* (1987), *reprinted in* Federal Sentencing Guidelines 313 (PLI Litig. & Admin. Practice Course, Handbook Series No. 146, 1987) 8, 24
U.S.S.G. 2B1.1 13
U.S.S.G. 2B1.1(b)(1) 18
U.S.S.G. 5G1.1(b) 14
U.S.S.G. 6A1.3 cmt. (1987) 24
U.S.S.G. 6A1.3(a) 21

Rules

Fed. R. Crim. P. 32(i)(3) 5, 24
Fed. R. Crim. P. 32.2(b)(4) 29
FED. R. CRIM. P. 57(b) 19
Fed. R. Evid. 1101(d)(3) 25

Constitutional Provisions

U.S. Const. amend. V 1, 20
U.S. Const. art. I 5
U.S. Const. art. I, § 10, cl. 1 6
U.S. Const. art. III, § 2, cl. 3 5
U.S. Const., art. I, § 9, cl. 3 ..... 2, 4, 6, 19

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 11,200 members nationwide and 28,000 affiliate members in fifty states, including private criminal defense attorneys, public defenders, and law professors.[1] The NACDL seeks to promote the proper administration of justice and to ensure that findings that affect the length of criminal sentences are made according to constitutionally required procedures. NACDL's intense concern for the fullest protection of fundamental Fifth and Sixth Amendment rights has led it to appear as *amicus curiae* in this Court on numerous occasions, including in *Blakely* v. *Washington*, 124 S. Ct. 2531, 2542 (2004) (noting NACDL's position), *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *United States* v. *Cotton*, 535 U.S. 625 (2002).

SUMMARY OF THE ARGUMENT

I. A Federal District Court violates the Fifth and Sixth Amendment rights of a criminal defendant when it relies on facts that were not both charged in the indictment and either found by a jury beyond a reasonable doubt or admitted by the defendant to increase the maximum sentence dictated by the United States Sentencing Guidelines ("Guidelines"). It does so regardless of whether the sentencing rules it applies were promulgated by a legislature, by courts, by an executive agency, or by an independent commission. There is therefore no meaningful distinction between the Guidelines and the Washington sentencing law that this Court examined in *Blakely*. Accordingly, that decision compels the conclusion

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored any part of this brief, and no person or entity, other than *amicus curiae*, its members, and its counsel, made a monetary contribution to the preparation or submission of this brief.

that the Guidelines establish mandatory limits on judicial discretion and are therefore equivalent to statutory limits for Sixth Amendment purposes.

The government's primary argument distinguishing *Blakely* is that the federal Sentencing Guidelines are judicial rather than legislative in character. This distinction is constitutionally irrelevant and also inaccurate. As a long line of cases in this Court and others applying the Ex Post Facto Clause to sentencing guideline schemes confirms, the Guidelines are fundamentally legislative in character.

Furthermore, the Guidelines' content and application are closely controlled by Congress, as reflected in legislation that dramatically altered the Guidelines by congressional fiat, the PROTECT Act. An essential component of the Guidelines was the preservation of limited judicial discretion in the form of reserved judicial authority to depart from the Guidelines in atypical cases. This departure authority is critical to the balance Congress struck in the Sentencing Reform Act between the need to eliminate disparity in sentencing while still providing individualized consideration to offenders' cases. In *Koon* v. *United States*, this Court accordingly recognized sentencing judges' discretion to depart on grounds that were not enumerated in the Guidelines themselves; it also applied a deferential abuse-of-discretion standard of review to departure decisions. The PROTECT Act narrowly circumscribed the departure powers of judges and abrogated this Court's decision in *Koon*, requiring de novo review of all departure decisions and also drastically limiting downward departures in certain sexual offense cases to grounds specifically approved in the Guidelines. The PROTECT Act further directed the U.S. Sentencing Commission ("Commission") to enact amendments to the Guidelines that "ensure that the incidence of downward departures are substantially reduced."

Nor did the PROTECT Act merely curtail sentencing judges' departure authority. Congress also drafted specific

guidelines for certain sexual offenses, and even wrote commentary in the Commission's name for those guidelines. The Act also repealed the requirement that at least three members of the Commission be federal judges; there is now no requirement that the Commission include any judges at all. Ominously, it also directed the collection of sentencing decisions by individual judges for review by the executive branch and Congress.

Even before the PROTECT Act, Congress had repeatedly dictated the form and content of specific Guidelines. More than sixty times since the Guidelines were first enacted, Congress has issued directives to the Commission that essentially dictated amendments to the Guidelines, sometimes directly specifying those amendments' language; mandated enhancements for certain types of crimes; and rejected amendments proposed by the Commission. Just as significant is Congress's creation of mandatory minimums, which short-circuit the Commission's role in determining appropriate punishments for conduct and distort the application of the Guidelines. By contrast, federal judges, individually or collectively, have no special voice in the Commission's policymaking role. In short, the proposition that the Guidelines reflect the "collective wisdom" of the judiciary, however valid at the inception of the Guidelines, has been disproven by years of legislative encroachment.

II. The second question presented by these cases addresses the consequence of a determination by this Court that the Guidelines are subject to the holding of *Blakely*. The provisions of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 ("SRA"), and the Guidelines that are inconsistent with the Sixth Amendment under *Blakely* are severable. Congress, of course, remains "free to reconstruct a sentencing system to achieve its goals in a manner consistent with constitutional requirements." U.S. Br. 44.

This Court should hold that, in the interim, sentencing must follow the process *already employed* by the Department

of Justice. The government must allege in indictments those facts that give rise to enhanced sentences under the Guidelines. In those few cases that do not result in a plea bargain, the same jury that determined guilt must decide the facts relevant to the enhancement in a bifurcated proceeding under the traditional "beyond a reasonable doubt" standard. The jury would itself have no sentencing authority. Instead, judges must exercise their discretion to impose sentences in the range determined by the Guideline provisions applicable to the facts found by the jury.

This Court should reject the Solicitor General's contrary view that the Guidelines are rendered "advisory" in – but only in – cases implicating the *Blakely* rule, such that the jury has no role to play and district judges have discretion to impose any sentence within the range set by the statute of conviction. That proposal is profoundly illogical as it, in fact, relies on a selective severing of portions of the SRA that Congress could never have imagined, and it furthermore flies in the face of Congress's determination to promulgate a binding guidelines scheme that would rationalize federal sentencing.

We note, however, that, even if this Court applies the *Blakely* rule retroactively, the Constitution's Ex Post Facto and Due Process Clauses prohibit the retroactive application of either the government's discretionary sentencing proposal or the use of juries to find sentencing facts to the cases of respondents and similarly situated defendants. For these defendants, the only constitutional solution is to reduce their sentences to the maximum permitted under applicable statutes and the Guidelines based on the existing jury verdict.

ARGUMENT

I. Under *Blakely*, the Federal Sentencing Guidelines Violate The Sixth Amendment.

The United States argues that the Guidelines are not subject to the Sixth Amendment rule announced in *Blakely* because the Commission effectively performs the sentencing

function that judges individually performed in the pre-Guidelines system, voicing the "accumulated judicial wisdom about the facts that matter at sentencing." U.S. Br. 24. The distinction on which the government primarily relies – that the Guidelines are judicial and not legislative – is immaterial and furthermore inaccurate, largely ignoring the dominant role of Congress in the Commission's work.

A. The Sixth Amendment Protects Against Encroachments on the Right to Jury Trial by Any Branch of Government.

The government's singular focus on what it views as the judicial character of the Guidelines completely misses the mark. The right of an "accused" to trial by jury is protected in our Constitution twice – in Article III, § 2, cl. 3, and in the Sixth Amendment. The placement of this core constitutional right in the Bill of Rights, rather than in Article I, shows that it makes no difference whether the Guidelines are "legislative" or "judicial" in character. The discussion of jury trials in Article III demonstrates that the judicial branch, in particular, is charged with protecting that right.

As respondents discuss at length, the Guidelines' provenance is simply irrelevant to the question whether their application violates defendants' Sixth Amendment rights. A criminal defendant has a "*right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Blakely*, 124 S. Ct. at 2543 (emphasis in original). When these essential facts are not submitted to the jury but are instead determined by a judge by a mere preponderance of the evidence, this right is violated, no matter who created the rules authorizing or directing the judge to do so. Thus, if the Judicial Conference were to adopt, and this Court were to promulgate, a rule of criminal procedure authorizing a federal judge to find facts that could raise a statutory maximum, that rule would violate *Blakely* no less than a statute adopted by Congress to the same effect. Cf. Fed. R. Crim. P. 32(i)(3).

B. The Federal Sentencing Guidelines Establish Mandatory Legislative Rules.

In any event, the distinction the government draws is inaccurate. As the Solicitor General points out, the Guidelines are the product of the Sentencing Commission, an agency located within the judicial branch, while the Washington State sentencing law was promulgated directly by the legislature. The mere location of the Commission in the judicial branch, however, is not a meaningful difference. As this Court and others have consistently recognized, the Guidelines are essentially legislative in character.

The Commission is a creation of the SRA, which authorizes the Guidelines. Accordingly, the Guidelines carry the force of law and are "binding on federal courts." *Stinson* v. *United States*, 508 U.S. 36, 42 (1993). As uniformly interpreted by the courts of appeals, Section 3553(b) of Title 18 of the U.S. Code prohibits sentences exceeding the top of the applicable Guidelines range unless the court makes findings of fact that justify an upward departure.[2] Even though the Commission is located in the judicial branch, this Court has treated the Guidelines as "the equivalent of legislative rules adopted by federal agencies.'" *Stinson*, 508 U.S. at 45. Guidelines promulgated pursuant to congressional delegation under the SRA are subject to the Sixth Amendment in the same fashion as any statute or other legislative rule.

This conclusion is reflected in the courts' consistent application to the Guidelines of the Ex Post Facto Clause, U.S. Const. art. I, § 9, cl. 3; see also *id.* art. I, § 10, cl. 1 (barring states from adopting ex post facto laws). That constitutional provision applies only to legislative acts or rules. See *Splawn* v. *California*, 431 U.S. 595 (1977). It applies to the Guidelines because they are mandatory and

[2] See, *e.g.*, *United States* v. *Davern*, 937 F.2d 1041 (CA6 1991) (en banc); compare *id.* at 1042 (Merritt, J., dissenting).

legislative in character. Indeed, every circuit that has considered the issue has concluded that the Ex Post Facto Clause applies to the Guidelines. See, *e.g.*, *United States* v. *Schnell*, 982 F.2d 216, 218 (CA7 1992) (collecting cases from all other circuits); see also U.S. Br. 25 (effectively conceding that "the *Ex Post Facto* Clause applies to changes in the Guidelines" (citing *United States* v. *Bell*, 991 F.2d 1445, 1447 n.4 (CA8 1993)). This Court itself applied the Clause to a similar state sentencing scheme in *Miller* v. *Florida*, relying on the fact that the guidelines, far from being "flexible 'guideposts' for use in the exercise of discretion," significantly constrained judicial discretion by requiring judges to make particular findings to justify departures from the guidelines sentencing range. 482 U.S. 423, 435 (1987).

As this Court has held, the Commission, although placed administratively in the judicial branch, does not perform judicial functions. *Mistretta* v. *United States*, 488 U.S. 361, 384-85 (1989) ("Although placed by the Act in the Judicial Branch, it is not a court and does not exercise judicial power."); *id.* at 394 (listing ways in which Commission differs from a court that exercises judicial power.); *id.* at 404 (observing that judges serving on the Commission assume a "wholly administrative role" and do not exercise judicial powers).

C. Congress Has Repeatedly Exercised Broad Control Over the Guidelines.

The government furthermore ignores several respects in which Congress directly controls the contents and application of the Guidelines. These include congressional oversight of judicial departures from the Guidelines, statutes mandating changes in the content of specific Guidelines, and laws creating mandatory minimum sentences that constrain the Guidelines' application.

1. Congressional Control of Guidelines Departures Restricts Judicial Discretion.

Congress exercises direct control over the primary discretionary authority retained by sentencing judges under the Guidelines – namely, the power to depart from an otherwise mandatory Guidelines range. Pursuant to the PROTECT Act, Pub. L. No. 108-21, § 401(n), 117 Stat. 667 (2003), judges must report all departures to the Sentencing Commission, which must in turn report them to Congress; the Commission is also specifically required to amend the Guidelines in such a way as to substantially reduce the incidence of departures.

The authority to depart from an otherwise mandatory sentencing range is a cornerstone of the SRA. In developing the original Guidelines under the Act, the Commission reviewed sentencing decisions in more than 10,000 cases. U.S. Sentencing Comm'n, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 21-39 (*Supplementary Report*) (June 18, 1987). Based on this analysis, the Commission developed a set of relatively narrow sentencing ranges corresponding to each offense and criminal history category. *Id.* at 17. The Commission recognized, however, that this formulaic, grid-based approach would "omit distinctions" important in many individual cases. *Ibid.* The Commission therefore protected the authority of a sentencing judge to depart from the Guidelines to ensure that each case would still be considered on the individual basis required by the SRA. *See id.* at 54; Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 14 (1988) (noting that the Guidelines permit flexibility for departures when necessary); 28 U.S.C. 991(b)(1)(B); see also S. REP. No. 255, 98th Cong., 1st Sess. 51-52 (1983) (asserting that the Guidelines are intended to preserve judicial discretion).

Thus, although a district court must issue a sentence within the applicable Guidelines range in most cases, it

retains the authority to depart – either upward or downward – from that range in atypical cases. 18 U.S.C. 3553(b); *Koon* v. *United States*, 518 U.S. 81, 92-96 (1996); *Mistretta*, 488 U.S. at 367 ("[Congress] rejected strict determinate sentencing because it concluded that a guideline system would be successful in reducing sentence disparities while retaining the flexibility needed to adjust for unanticipated factors arising in a particular case.") (citation omitted); see also Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 14-SPG CRIM. JUST. 28, 35 (1999) (proposing that the Commission "increase * * * the discretionary authority of the sentencing judge" to depart in cases outside of the "heartland" by simplifying the Guidelines). In *Koon*, recognizing "the wisdom, even the necessity, of sentencing procedures that take into account individual circumstances" via the departure power, this Court applied a deferential abuse-of-discretion standard of review to departure decisions. 518 U.S. at 92, 113 (citing 28 U.S.C. 991(b)(1)(B)). The Court also held that the basis for departure need not be limited to the specific reasons listed in the Guidelines. *Id.* at 82.

The PROTECT Act, however, upset this carefully crafted balance between the goals of consistency and individualized treatment in sentencing. The purpose of the sentencing provisions of the PROTECT Act was to "address[] the longstanding problem of downward departures from the Federal Sentencing Guidelines." H.R. CONF. REP. NO. 108-66, at 58, *reprinted in* 2003 U.S.C.C.A.N. 683, 694. The legislation aims to eviscerate judicial discretion in sentencing through the departure mechanism. The Judicial Conference of the United States has recognized the effect of the PROTECT Act and has sought repeal of some of its provisions. News Release, Administrative Office of the U.S. Courts (Sept. 23, 2003), *available at* http://www.uscourts.gov/Press_Releases/jc903.pdf. Thus far, such efforts have been unsuccessful. See American Bar Ass'n, Justice Kennedy Commission, *Reports with Recommendations to the ABA House of Delegates*, *available at* http://www.abanet.org/

crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf (Aug. 2004) (criticizing the PROTECT Act's effect on judicial discretion); David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 S.M.U. L. REV. 211 (2004).

Among other requirements, the statute specifically directs the Commission to promulgate amendments to the Guidelines that "ensure that the incidence of downward departures [is] substantially reduced." Pub. L. No. 108-21, § 401(m)(2)(A).[3] It also abrogates this Court's decision in *Koon* by mandating that departures be reviewed de novo on appeal, *id.* § 401(d)(2), and, in cases involving certain sexual offenses, by forbidding departures on any ground not "affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, United States Code," *id.* § 401(b)(1)(B). Congress also abolished many pre-existing grounds of departure for certain crimes, *id.* § 401(b) (adding § 5K2.22), and expressly prohibited the Commission from adding any new grounds of downward departure, or from amending the Guidelines in a manner "inconsistent with" any of the congressional amendments to the Guidelines themselves, *id.* § 401(j). With the judiciary now stripped by Congress of much of its departure power, the government cannot credibly argue that the Guidelines merely "channel" traditional judicial discretion, or that they are judicial rather than legislative in nature.

The PROTECT Act also requires the Chief Judge of each district to report to the Commission with a statement providing reasons for every sentence in her district that

[3] Obeying this congressional directive, the Commission amended the Guidelines to sharply curtail the available grounds for downward departures. See U.S. Sentencing Comm'n, *Federal Sentencing Guidelines Manual*, app. C at 352-58, amend. 653 (2003); see also *United States* v. *Mateo*, 299 F. Supp. 2d 201, 205 (S.D.N.Y. 2004).

departs from the otherwise applicable Guidelines range. Pub. L. No. 108-21, § 401(h). The Commission in turn must make these reports available to the Attorney General and to the Judiciary Committees of the House and Senate. This provision pointedly requires that "the identity of the sentencing judge" be included in these reports. *Ibid.* In addition, the Attorney General must report any downward departure, except for substantial assistance departures requested by a prosecutor, to the Judiciary Committees of the House and Senate, again including "the identity of the district court judge." *Id.* § 401(l)(2)(B)(iii).[4]

Taken together, these provisions of the PROTECT Act substantially limited the ability of sentencing judges to exercise the departure authority that was so central to the SRA. As one district judge has put it: "[T]he day of the downward departure is past. Congress and the Attorney General have instituted policies designed to intimidate and threaten judges into refusing to depart downward, and those policies are working." *United States* v. *Kirsch*, 287 F. Supp. 2d 1005, 1006 (D. Minn. 2003). In the short history of the PROTECT Act, other judges have recognized its coercive impact on departure authority. See, *e.g.*, *United States* v.

[4] The potential for intimidation of individual judges is not illusory. After a respected district judge testified on sentencing issues before a House committee, the committee threatened to subpoena the judge's records regarding sentences he had imposed and publicly accused him of judicial misconduct in those decisions. See Zlotnick, *supra*, at 227-28; see also Hon. William H. Rehnquist, Remarks of the Chief Justice to the Federal Judges Ass'n Bd. of Directors Mtg. (May 5, 2003), *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_05-05-03.html ("[O]ne portion of the [PROTECT Act] provides for the collection of such information on an individualized judge-by-judge basis • • • [that] could amount to an unwarranted and ill-considered effort to intimidate individual judges in the performance of their judicial duties.").

Mellert, No. CR 03-0043 MHP, 2003 WL 22025007, at *2 (N.D. Cal. July 30, 2003) ("[T]he wisdom of the years and breadth of experience accumulated by judges and the Sentencing Commission * * * is shucked * * *."); *United States* v. *Kim*, No. 03 Cr. 413 (RPP), 2003 WL 22391190, at *7 (S.D.N.Y. Oct. 20, 2003) (noting that the legislature has taken departure authority away from judges in favor of Assistant U.S. Attorneys), *United States* v. *Green*, No. Cr. A. 02-10054-WG4, 2004 WL 1381101, at *15 (D. Mass. June 18, 2004).

2. Congress Increasingly Dictates Specific Guidelines.

At the time of this Court's *Mistretta* decision, the relationship between Congress and the Commission was relatively new and developing. Since then, Congress has increasingly dictated the form, content, and specific language of the Guidelines. Steven L. Chanenson, *Hoist With Their Own Petard?*, 17 FED. SENT. REP. (forthcoming Sept. 2004), draft at 15, *available at* http://papers.ssrn.com/sol3/papers/cfm?abstract_id=586782. Thus, although the government characterizes the Guidelines as "the product of * * * a body in the Judicial Branch," U.S. Br. 12, it is forced to concede that Congress "has rejected proposed guidelines," "has directed the Commission to review and, if appropriate, amend Guidelines," and "has even enacted Guidelines amendments itself," *id.* at 24-25 (citations omitted). Even these concessions, however, substantially understate the frequency and intrusiveness of congressional intervention in the Guidelines process.

Since *Mistretta* was argued in October 1988, Congress has enacted over sixty laws that either directly dictate the content of particular Guidelines or mandate that the Commission enact specified revisions. These directives fall into several discrete categories, each a substantial legislative interference in a supposedly "judicial process." The specific measures are collected in the Appendix, *infra*.

Congress has issued fifty-five directives that directly alter the Guidelines. Four enactments redrafted Guidelines provisions into language of the legislature's choosing, such as when Congress in the PROTECT Act increased the base offense level for kidnapping from twenty-four to thirty-six, see Pub. L. No. 108-21, § 104(a), and furthermore dictated the text of and even the "commentary" to the Guidelines provisions dealing with sexual offenders, *id.* § 401(b), (g), (i). Fifty-one statutory provisions directed the Commission to make a specific change to particular provisions of the Guidelines without specifying the precise language. Examples range from a sweeping mandate to increase by at least two the offense level for certain drug offenses involving List I chemicals, see Pub. L. No. 104-237, § 302(c), 110 Stat. 3105 (1996), to a narrowly focused enhancement of at least two levels for property offenses at national cemeteries, see Pub. L. No. 105-101, § 2, 111 Stat. 2202 (1997).

On twelve additional occasions, Congress directed the Commission to enhance the sentencing ranges for certain types of conduct, leaving only the precise level of enhancement to the Commission. Again, these mandatory changes ranged widely in scope and content. Compare Pub. L. No. 103-322, § 110501, 108 Stat. 2015 (1994) (mandating that the Commission enact an enhancement for all crimes of violence or drug trafficking involving a semiautomatic firearm) with *id.* § 180201(c), 108 Stat. 2047 (1994) (requiring an enhancement for drug offenses committed at truck stops and safety rest areas).

Eleven additional provisions, while not expressly requiring amendments, have nevertheless "requested" or "recommended" changes. Each has resulted in a Guidelines change, nine of which expressly refer to Congress's instructions. For example, as part of the Sarbanes-Oxley Act of 2002, Congress issued a directive to the Commission to "ensure that the guideline offense levels and enhancements under Guideline § 2B1.1 (as in effect on the date of enactment of this Act) are sufficient for a fraud offense when the number

of victims adversely involved is significantly greater than 50." Pub. L. No. 107-204, § 1104(b)(5), 116 Stat. 809 (2002). The Commission revised the Guidelines accordingly. See U.S. Sentencing Comm'n, *Federal Sentencing Guidelines Manual*, app. C, at 286-94, amend. 647 (2003).

Furthermore, Congress has specifically rejected the Commission's proposals for amendments to the Guidelines that would have lowered sentences for money-laundering offenses and offenses involving crack cocaine. See Pub. L. No. 104-38, § 1, 109 Stat. 334 (1995). In the Anti-Drug Abuse Act of 1986, Congress mandated that, for sentencing purposes, any given quantity of crack cocaine be treated as equivalent to one hundred times its weight in powder cocaine. See 21 U.S.C. 841(b)(1)(A)(ii), (iii). The crack-powder distinction, which was subsequently incorporated into the Guidelines, resulted in gross sentencing disparities along racial lines. U.S. Sentencing Comm'n, *1995 Special Report to Congress: Cocaine and Federal Sentencing Policy* (Feb. 1995). Seeking to redress this problem, the Commission proposed an amendment to the Guidelines that would reduce those disparities. 60 FED. REG. 25,074 (May 10, 1995). Congress rejected that amendment despite the Commission's strong recommendation and two subsequent Commission reports advising that "the current federal cocaine sentencing policy is unjustified and fails to meet the sentencing objectives * * * [of] the Sentencing Reform Act." U.S. Sentencing Comm'n, *Report to Congress: Cocaine and Federal Sentencing Policy*, 91 (May 2002); see also U.S. Sentencing Comm'n, *Report to Congress: Cocaine and Federal Sentencing Policy* (Apr. 29, 1997).

3. Congress Controls the Guidelines Through Its Enactment Of Mandatory Minimum Sentences.

Congress has repeatedly enacted mandatory minimum sentences that supersede the otherwise applicable Guideline and control a sentence regardless of the appropriate

Guidelines range for the offense, U.S.S.G. 5G1.1(b). See, *e.g.*, 21 U.S.C. 841(b)(1)(A), (B) (mandatory minimums for manufacture or distribution of controlled substances); 18 U.S.C. 924(c) (mandatory minimums for use of a firearm in the commission of a crime of violence or drug trafficking crime).[5] Such congressionally mandated minimums thus "prevent the commission from carrying out its basic, congressionally mandated task: the development, in part through research, of a rational, coherent set of punishments." Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, Speech at the University of Nebraska College of Law (Nov. 1998), *in* 14-SPG CRIM. JUST. 28, 33; see generally U.S. Sentencing Comm'n, *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (1991) (*Mandatory Minimum Penalties*). They also "transfer sentencing power from the courts to the prosecution" by precluding a district court from departing below the mandatory minimum except on the request of the prosecution. *Mandatory Minimum Penalties*, *supra*, at iii; see 18 U.S.C. 3553(e); *Melendez* v. *United States*, 518 U.S. 120 (1996).[6]

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[5] There are dozens more such mandatory minimum provisions in the federal code. Ian Weinstein, *Fifteen Years After The Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AM. CRIM. L. REV. 87, 99 & n.56 (2003) (citing U.S. Sentencing Comm'n, *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (1991)).

[6] See also Hon. Anthony M. Kennedy, Address to the American Bar Association (Aug. 9, 2003), *at* http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html ("Under the federal mandatory minimum statutes a sentence can be mitigated by a prosecutorial decision not to charge certain counts. There is a debate about this, but in my view a transfer of sentencing discretion from a judge to an Assistant U.S. Attorney, often not much older than the defendant, is misguided * * * . Most of the sentencing discretion should be with the judge, not the prosecutors.").

In short, mandatory minimums "skew the entire set of criminal punishments, for Congress rarely considers more than the criminal behavior directly at issue when it writes these provisions." Speech of Justice Breyer, *supra*, at 33. When a court sentences in a case involving a mandatory minimum that exceeds the applicable Guidelines range, it has no discretion at all, but rather must sentence exactly at the statutory minimum, so as to come as close as possible to satisfying the Guidelines without violating the conflicting statute. The fact that Congress can and often does impose this kind of distortion further demonstrates that sentencing under the Guidelines operates pursuant to a legislative scheme, not a judicial one.

D. The Commission Does Not Express the Collective Voice of Individual Sentencing Judges.

Despite the government's description of the Guidelines as "accumulated judicial wisdom * * * collectively reflected," U.S. Br. 24, the Commission offers no controlling voice or role for the judiciary. Although judges do serve on the Commission, that agency is not in any meaningful respect a vehicle for gathering and expressing the views of judges. Testimony of Deputy Att'y Gen. Larry Thompson Before U.S. Sentencing Comm'n (Mar. 19, 2002), *available at* http://www.ussc.gov/hearings/031902.htm ("In our constitutional system, we believe the sentencing commission exists to effectuate the express will of Congress.").

A key part of the PROTECT Act repealed the prior requirement that at least three judges must be members of the Commission, replacing it with a mandate that *no more than* three judges may serve. This provision thus expressly forbids judges from constituting a majority of the Commission, and even permits a Commission with no judicial members at all. And even if the Commission were composed entirely of judges, it could hardly be said that the few chosen represented the "collective[]" wisdom of the hundreds of members of the federal judiciary.

The governing statutes and the Commission's rules prescribe no special role for the judiciary. New and amended Guidelines may be proposed by anyone, and no institutional preference exists to ensure that the views of judges will receive special weight. The Commission repeatedly explains its amendments as "responding to congressional directives," "addressing Commission interests," and "resolving circuit conflicts." See, *e.g.*, U.S. Sentencing Comm'n, 2001 Annual Report 9 (2001), *at* http://www.ussc.gov/ANNRPT/2001/ch2-2001/PDF. Nowhere does it cite a direct response to judicial comment or opinion as a reason for a change to the Guidelines. And despite the fact that more than 650 Guideline amendments have been effected since 1988, we have not found more than three or four instances in which the Commission reported that a Guideline amendment was in any way influenced by judges who were not members of the Commission. See U.S. Sentencing Comm'n, *Federal Sentencing Guidelines Manual*, app. C (2003) (setting forth amendments and reasons for adoption); 1995-2002 U.S. Sentencing Comm'n Ann. Reps., *at* http://www.ussc.gov/ANNRPT/1999/ar99toc.htm. Nor, as a practical matter, are judges substantially involved in the Guidelines revision process. During the past eight years, fewer than fifteen judges appeared to testify before the Commission on matters pertaining to the Guidelines; by comparison, non-judicial testimony was offered by more than 150 witnesses at those same hearings. See U.S. Sentencing Comm'n, Public Hearing Testimony and Transcripts, *at* http://www.ussc.gov/hearings.htm (last visited Sept. 18, 2004); 1995-2002 U.S. Sentencing Comm'n Annual Reports and Statistical Sourcebook, *at* http://www.ussc.gov/annrpts.htm (last visited Sept. 18, 2004) (collecting the Commission's annual reports from 1995-2002 with public hearing witness lists).

The Court should accordingly hold that factual findings that enhance sentences under the federal Guidelines are subject to the strictures of the Sixth Amendment.

II. Federal Sentencing Practices Can Be Adapted To The Requirements Of The Sixth Amendment Without Eliminating The Binding Effect Of The Federal Guidelines That Congress Deemed Essential To Reduce Sentencing Disparities.

In answering the second question presented, this Court should reject the government's argument that the district courts should treat the Guidelines as merely "advisory," a proposal that both lacks any internal coherence and runs contrary to Congress's principal goal of reducing sentencing disparity. The Court should instead require sentence-enhancing facts to be alleged in the indictment and proven beyond a reasonable doubt to the jury in a bifurcated sentencing hearing. Under this system, the jury would not act as a "sentencing jury" – *i.e.*, it would not actually "select an appropriate sentence from within a statutory range of punishment," Nancy J. King & Roosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 886 (2004) – but instead would simply find the relevant facts. The judge would determine an appropriate sentence within the Guidelines range that those facts generate.

For example, in fraud cases, the applicable sentencing range is determined in significant part based on the monetary value of the loss inflicted by the offense. U.S.S.G. 2B1.1(b)(1). Thus, in a typical fraud case, the loss amount should be charged in the indictment, and the jury at sentencing should be instructed to identify, through an interrogatory or special verdict form, the amount of loss that is proven by the government beyond a reasonable doubt. The judge would then determine the appropriate Guidelines range based, in part, on the applicable offense level, which would in turn be based on the jury's findings regarding, *inter alia*, the amount of loss. The judge would retain the discretion to select a sentence within that range and to determine if departures permitted by law are appropriate. The principal difference between this system and the one employed pre-

Blakely would be that more rigor, and thus enhanced reliability, would be introduced into the fact-finding process.[7]

Preliminarily, however, we note that the second question presented will not resolve the disposition of *these cases*. For a variety of reasons, the government is precluded from seeking to have respondents re-sentenced. In *Fanfan*, the government had the opportunity to seek jury findings of the relevant sentencing facts in the wake of *Blakely*, but made no such request. And to the extent the Court concludes that a single jury must determine a defendant's guilt and the facts relevant to any enhancement (albeit in bifurcated proceedings), re-sentencing is precluded in both cases because the juries have been discharged.

Re-sentencing of these respondents would also likely be unconstitutional, although (for the reasons just stated) the Court need not reach that issue in these cases. It would violate the Ex Post Facto Clause to adopt a rule under which respondents would be re-sentenced subject only to the range set by the statute of conviction. That approach would substitute the higher statutory maximum for the lower Guidelines maximum to which respondents previously had a "legal right" at the time of the offense, *Blakely*, 124 S. Ct. at 2540, in violation of the Ex Post Facto Clause, see *Miller* v. *Florida*, 482 U.S. 423, 424 (1987).[8]

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[7] Federal courts may impose appropriate procedural safeguards, such as bifurcation of the guilt and sentencing phases, to protect defendants' rights. *Holmes* v. *United States*, 363 F.2d 281, 283 (CADC 1966) (Bazelon, C.J.). See also FED. R. CRIM. P. 57(b) .

[8] The scheme imposed pursuant to the Court's severability analysis would be subject to the Ex Post Facto Clause rather than the Due Process Clause because the Court's ruling would constitute a determination of "legislative intent," *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999), as opposed to an act of "common law judging," such as "the daily task of formulating and passing upon criminal defenses and interpreting such doctrines as causation and intent," *Rogers* v. *Tennessee*, 532

Re-sentencing respondents – as the Solicitor General strongly suggests, J.S. Br. 53 – would furthermore violate the Double Jeopardy Clause. The government comitted from its indictments of respondents the facts that, undler the *Apprendi* line of cases, were required to be alleged because they trigger the enhancements of respondents' sentences. Those facts are, at the least, "the functional equivalent[s] of '* * * element[s] of a greater offense than the one covered by the jury's guilty verdict." *Apprendi*, 530 U.S. at 494 n.19. TTo now re-indict respondents would thus be to prosecute them unconstitutionally for greater offenses than thee ones for which they have already been convicted, see *Blocktburger* v. *United States*, 284 U.S. 299, 304 (1932); *Brown* v.. *Ohio*, 432 U.S. 161 (1977), as there is "no principled reason tto distinguish * * * between what constitutes an offense for purposes of the Sixth Amendment's jury-trial guarantee and what constitutes an 'offence' for purposes of the Fifth Amendment's Double Jeopardy Clause," *Sattazahn* v. *Pennsylvania*, 537 U.S. 101, 111-12 (2003) (plurality opinion). Alternatiwely, even if such additional "enhancing facts" were not deemed further "elements" for purposes of double jeopardy analysis, subsequent indictments in these cases would unconstitutionally prosecute respondents furtther for the *same* offenses for which they were previously convicted.[9]

U.S. 451, 460, 461-62 (2001). But eeven were that not so, the retroactive application of such a sscheme to respondents would violate the Due Process Clause. SSee *Bouie* v. *Columbia*, 378 U.S. 347, 353 (1964) ("An unforeeseeable judicial enlargement of a criminal statute, applied retrroactively, operates precisely like an ex post facto law."); *Marks* vv. *United States*, 430 U.S. 188 (1977).

[9] A subsequent proseccution would not be saved by the fact that jeopardy has not terminated with respect to respondents' sentencing. The very point of *Apprendi* and its progeny is that these are not rmere sentencing facts, but rather that, like any elements, theyy must be alleged in an indictment and proved to a jury beyondd a reasonable doubt (unless admitted). In circumstances like these, where the facts in question must determined in a proceeding with "the hallmarks of a trial on guilt or innocence," double jeopardy protections apply. *Bullington* v. *Missouri*, 451 U.S. 430 (1981). Compare *Monge* v. *California*, 524 U.S. 721, 728 (1998) (sentencing proceedings generally "do not place a defendant in jeopardy for an 'offence'").

For this reason, if this Court applies the *Blakely* rule retroactively, it should hold that defendants in respondents' situation made be sentenced only on the basis of the existing indictments and jury verdicts in their cases.

A. The Government's Proposal Would Thwart the SRA's Principal Goal of Reducing Unwarranted Sentencing Disparities.

Despite the strong presumption in favor ot severability, see *Regan* v. *Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality opinion), the Solicitor General contends that the SRA and Guidelines – including judicial fact-finding by a bare preponderance of "reliable," albeit non-evidentiary, "information," U.S.S.G. 6A1.3(a) – "embod[y] a single coherent policy," such that the provisions deemed violative of the Sixth Amendment cannot be severed from the whole. U.S. Br. 45 (quoting *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999)). On that basis, he contends, this Court should deem the entire Guidelines scheme "advisory" and empower the district courts with the discretion to impose a sentence within the range set by the statute of conviction. That view of severability is inconsistent with both the government's own proposed solution and Congress's intent in enacting the SRA.

1. The government's proposal to authorize district court judges to impose any sentence within the range set by the statute of conviction flies in the face of Congress's principal objective in passing the SRA: the adoption of a binding sentencing system to reduce sentencing disparity. Congress

would not have intended federal sentencing to operate in a manner contrary to that fundamental goal. As the Solicitor General elsewhere acknowledges, "both the decrease in uniformity and the decrease in proportionality would be *directly contrary* to Congress's intent that the Guidelines would avoid unwarranted disparities and ensure just punishment." U.S. Br. 54-55 (emphasis added).

Congress thus directed the Commission to pay "particular attention" to "providing certainty and fairness in sentencing and reducing unwarranted sentence disparities." 28 U.S.C. 994(f). The Senate Report that accompanied the SRA reiterated Congress's belief that "[t]he shameful disparity in criminal sentences is a major flaw in the existing criminal justice system, and makes it clear that the system is ripe for reform," S. REP. NO. 98-225, at 65, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3248 and declared that, as a result of the SRA's passage, "[f]or the first time, federal law will assure that the federal criminal justice system will adhere to a consistent sentencing philosophy," *id.* at 59, *reprinted in* 1984 U.S.C.C.A.N. at 3242.

Indeed, the government would have this Court enact a proposal that Congress explicitly spurned. See *Mistretta*, 488 U.S. at 367. In rejecting Senator Mathias's attempts to make the Guidelines only advisory, the Senate Judiciary Committee specifically cited the "poor record[s]" of states with voluntary guideline systems: the district attorney for Middlesex County Massachusetts, testified that "the voluntary guidelines in that state" were completely ineffective in reducing sentencing disparities and imposing a rational order on criminal sentencing in the state, because judges generally did not follow them." S. REP. NO. 98-225, at 79, *reprinted in* 1984 U.S.C.C.A.N. at 3262.

2. The Solicitor General's claims of non-severability are, moreover, profoundly inconsistent with its proposed solution, which would in fact cherry-pick for retention as binding law the provisions of the SRA and Guidelines that the government

prefers. Thus, the government argues that basic provisions of the SRA – such as the sentencing factors set out in 18 U.S.C. 3553(a) – would remain in force even if this Court held other provisions of the SRA unconstitutional. See U.S. Br. 67. Similarly, the government apparently *would leave the Guidelines in place* in the myriad cases that do not involve an enhancing fact triggering the Sixth Amendment. Even in those cases in which the Guidelines were deemed no longer binding, the government would not dispense with them altogether but instead would treat them as "advisory," a characterization that would presumably give the Guidelines some unspecified authoritative role – one that could be enforced on appeal – in cabining judicial discretion. And, perhaps most dramatically (but never discussed in the Solicitor General's brief), the government presumably would not reinstate parole, which was eliminated as a central element of the compromise embodied in the SRA.

Notwithstanding the government's reliance on the selective severance of the SRA and Guidelines, it notably makes no effort at all to defend its position under this Court's severability precedents. Nor could it do so, because its proposal is indefensible. Congress would not have intended the determination whether a particular case is subject to mandatory Guidelines sentencing to hinge (as it would under the government's position) solely on whether it involves an enhancing fact, or that the Sentencing Commission would have anticipated such a scheme.

2. The prosecutorial authority inherent in the government's proposal would moreover be so sweeping as to violate basic principles of due process. After a trial or guilty plea, prosecutors alone would have the complete discretion whether to assert enhancing facts that would not merely trigger an increase in sentence pursuant to a given sentencing scheme, but would trigger a shift to another sentencing scheme entirely. That is, under the government's proposal, whether the Guidelines control the sentence in any given case would depend solely on whether the prosecutor asks for an

enhancement based on facts not charged to the jury. The prosecutor would be free to decide what facts to allege on the basis of her assessment of whether application of the Guidelines would increase or decrease the defendant's sentence. The result would be to compound the sentencing disparities that originally plagued pre-Guidelines sentencing, because disparities would be introduced not just within but between sentencing schemes. This system would exacerbate the grave due process concerns that arise from the government's proposal to permit virtually indiscriminate judicial sentencing without any of the protections of the Sixth Amendment.

In 1987, the Commission anticipated that increased formality would be required in the fact-finding portion of the sentencing process that would accompany a determinative guidelines system. See U.S. Sentencing Comm'n, *Supplementary Report*, *supra*, *reprinted in* Federal Sentencing Guidelines 313, 363 (PLI Litig. & Admin. Practice Course, Handbook Series No. 146, 1987) (citing Note, *How Unreliable Factfinding Can Undermine Sentencing Guidelines*, 95 YALE L.J. 1258 (1986)). The Commission thus recognized in its initial Guidelines that because "[t]he court's resolution of disputed sentencing factors usually has a measurable effect on the applicable punishment[,] * * * [m]ore formality is * * * unavoidable if the sentencing process is to be accurate and fair." U.S.S.G. 6A1.3 cmt. (1987). However, the Commission opted not to mandate formal fact-finding procedures, instead relying on the federal courts to resolve the "procedural details" of the sentencing process. See *Supplementary Report*, *supra*, at 363.

The ad hoc fact-finding procedures subsequently developed by federal courts under the very general language of Federal Rule of Criminal Procedure 32(i)(3) and Guideline § 6A1.3 to resolve disputed factual issues in the federal sentencing scheme do not even begin to approach the formal, reliable procedures envisioned by the Commission and guaranteed by the Due Process Clause. By retaining the

current system's use of unfair and unreliable fact-finding procedures despite their deleterious effects on the defendant's constitutionally protected interests, while at the same time eliminating the restraints on judicial discretion imposed by the Guidelines scheme, the government's proposal would exacerbate those constitutional concerns immeasurably. Just to cite the most prominent examples:

(1) defendants are not guaranteed the right to a hearing on disputed factual issues, see, *e.g.*, *United States* v. *Robles-Torres*, 109 F.3d 83, 85 (CA1 1997);

(2) sentencing factors need be proved only by the lesser preponderance-of-the-evidence standard, thereby leading to the inclusion of uncharged and even acquitted conduct in the calculation of a defendant's guideline range, see, *e.g.*, Benjamin E. Rosenberg, *Criminal Acts and Sentencing Facts: Two Constitutional Limits on Criminal Sentencing*, 23 SETON HALL L. REV. 459 (1993); Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179, 1186-1207 (1993);

(3) the factual reliability provided by the Federal Rules of Evidence, including protection against the use of hearsay, does not apply in sentencing hearings, see, *e.g.*, Fed. R. Evid. 1101(d)(3); 18 U.S.C. 3661, 21 U.S.C. 850; *United States* v. *Miele*, 989 F.2d 659, 663 & n.5 (CA3 1993) (Becker, J.) (citing authorities); Frank O. Bowman III, *Completing the Sentencing Revolution: Reconsidering Sentencing Procedure in the Guidelines Era*, 12 FED. SENT. R. 187, at *7 (2000);

(4) defendants may also be denied the right to subpoena witnesses to challenge factual allegations at sentencing, see, *e.g.*, *United States* v. *Jimenez Martinez*, 83 F.3d 488, 498 (CA1 1996); and

(5) prosecutors are consistently engaging in fact- and charge-bargaining, with the result that the facts which are ultimately presented to the court seldom constitute a complete and accurate report, see, *e.g.*, *United States* v. *Green*, No. CR. A. 02-10054-WGY, 2004 WL 1381101, at *9 (D. Mass. June 18, 2004) ("The most repugnant of the Department's tactics is

to lie to the Court in order to induce a guilty plea. This is the process known as 'fact bargaining.'"); Tony Garoppolo, *Fact Bargaining: What the Sentencing Commission Has Wrought*, 10 CRIM. PRAC. MAN. (BNA) 405, 405 (Oct. 9, 1996) (terming fact-bargaining "the dirty little secret in the prosecution of federal criminal cases").

B. The Proper Approach Is to Require That Enhancing Facts Be Alleged in Indictments And Proved to the Jury Beyond a Reasonable Doubt.

Rather than defending its own position, the government concentrates on attacking the use of juries to determine facts under the Guidelines as inconsistent with congressional intent and thus militating against severability. The government argues principally that Congress (and in turn the Sentencing Commission) anticipated that the Guidelines generally "would be applied based on fact-finding by the sentencing court, not a jury." See U.S. Br. 46-49. That is not, however, an argument against severability; it is instead a recitation of the characteristic of the Guidelines that violates the Sixth Amendment. Judicial fact-finding is not so inextricably intertwined with the essential elements of federal sentencing that the Guidelines cannot function without it.

The government does correctly note that "Congress was responding to perceived problems with the sentences imposed by judges, not juries, and so the Senate Report made clear that the projected guidelines 'are designed to structure judicial sentencing discretion.'" U.S. Br. 48. But this is an argument *against* the government's position. The SRA and the Guidelines were both developed with the explicit and overriding purpose of limiting judicial sentencing discretion. Congress's concern with the role of judges in sentencing was clear both to the SRA's supporters and opponents. Compare 130 CONG. REC. 976 (1984) (statement of Sen. Laxalt) ("The present problem with disparity in sentencing * * * stems precisely from the failure of [f]ederal judges – individually and collectively – to sentence similarly situated defendants in

a consistent, reasonable manner. There is little reason to believe that judges will now begin to do what they have failed to do in the past.") with *id.* at 973 (statement of Sen. Mathias) ("The proponents of the bill * * * argue in essence that judges cannot be trusted. You cannot trust a judge * * * you must not trust a judge."). By transforming judicial fact-finding from a vice that Congress sought to limit into a value that it sought to preserve, the government thus turns both logic and history on their heads.

The government's contention that the use of juries would be inconsistent with this Court's statement that the "'relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress,'" U.S. Br. 45 (quoting *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 685 (1987) (emphasis in U.S. Br.)), is incorrect as well. It is fair to say, as the Solicitor General does, that "Congress's means of achieving particular goals, as well as its ultimate ends, must be considered." *Ibid.* But that argument cuts against the government's position as well, for the relevant *means* that Congress enacted to rationalize federal sentencing was to direct the promulgation of binding sentencing guidelines. The Solicitor General's contention that the Guidelines should be merely "advisory" obviates Congress's choice; the use of juries preserves it.

Faced with the choice of junking the Sentencing Guidelines in their entirety or, on the other hand, using juries to determine sentencing facts, "Congress would probably have thought that [the use of juries to determine sentencing facts] was an effective (though, perhaps, not the most effective) means of pursuing its objective." *Denver Area Educ. Telecomm. Consortium, Inc.* v. *FCC*, 518 U.S. 727, 767-68 (1996) (plurality opinion). Although the legislative history of the SRA does not endorse the use of juries to find sentencing facts, "Congress' silence is just that – silence – and does not raise a presumption against severability." *Alaska Airlines, Inc.*, 480 U.S. at 686. If Congress really is as opposed to an expanded role for the jury in sentencing as the

government claims, then it can easily enact an alternative solution. Until then, however, it would cause far less disruption to require that sentence-enhancing facts be found by the jury than to strike down the entire Guidelines scheme pending possible congressional action.

The Solicitor General also argues against the use of juries on the ground that the fact-finding required would be "unfeasibly complex." U.S. Br. 54. Of course, in ninety-seven percent of all federal criminal prosecutions, the case never reaches the jury. But in all events, the government's argument here "is not so much a criticism of *Apprendi* as an assault on jury trial generally." *Blakely*, 124 S. Ct. at 2543. "Our Constitution and the common-law traditions it entrenches, however, do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury." *Ibid.* In our system, juries are trusted to resolve matters of considerable complexity, such as complicated matters involving statistical evidence and/or conflicting expert testimony.[10]

The means for conducting jury fact-finding are moreover well established – so much so that, on directions from the Department of Justice following *Blakely*, federal prosecutors

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[10] Thus, for example,

> Antitrust litigation * * * involves evidence concerning market definition, market shares, and a host of other highly technical questions of economic theory and effects on competition and prices. Securities litigation often involves a long chain of intricate commercial and financial transactions, comprehension of which requires immersion in arcane terminology, practices, and concepts. The same is true of some white collar crime prosecutions under RICO. Patent litigation is also technically demanding, as are medical malpractice cases and litigation involving engineering issues.

Peter H. Schuck, *Judicial Avoidance of Juries in Mass Tort Litigation*, 48 DEPAUL L. REV. 479, 501 (1998).

have been alleging enhancing facts in indictments and proving them to juries at sentencing. And ever since *Apprendi*, the government has regularly pleaded drug quantity and type in indictments and secured special jury findings on those questions. The government never explains how its claim that jury fact-finding is impracticable can be reconciled with this actual experience. Indeed, several lower federal courts have already called for juries to be convened if prosecutors insist on seeking enhanced sentences based on facts that were neither admitted by the defendant nor found by a jury. See, *e.g.*, *United States* v. *Ameline*, 376 F.3d 967, 983 (CA9 2004); *United States* v. *Booker*, 375 F.3d 508, 514 (CA7 2004). See generally *United States* v. *Khan*, 325 F. Supp. 2d 218, 231-32 (E.D.N.Y. July 20, 2004) (describing history of jury sentencing). In several states' criminal justice systems, moreover, juries have for centuries been responsible for determining the sentence itself – a role that encompasses and extends beyond the mere fact-finding role that we urge and that the Constitution requires. See Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 953 n.1 (2003) (listing states).

"There is no novelty in a separate jury trial with regard to the sentence." *Booker*, 375 F.3d at 514. Such bifurcated jury trials are already a mandatory part of capital prosecutions, *Ring* v. *Arizona*, 536 U.S. 584 (2002), and are commonly used to adjudicate criminal forfeiture allegations, Fed. R. Crim. P. 32.2(b)(4). Federal civil trials typically involve (and, under the Seventh Amendment, arguably require) a jury to determine liability and damages in separate proceedings. Cf. *Feltner* v. *Columbia Pictures Television, Inc.*, 523 U.S. 340, 353 (1998) ("The [Seventh Amendment's] right to a jury trial includes the right to have a jury determine the *amount* of statutory damages, if any."). Indeed, the only anomaly in the federal system today is the *absence* of jury fact-finding for criminal sentencing. See Hoffman, *supra*, at 954 ("Apparently, jurors are necessary and trustworthy only at the two ends of the 'importance' continuum—in civil cases where

only money is at stake and in capital cases where a life is at stake. They are somehow unnecessary or untrustworthy in the vast middle, where only judges are trusted to impose prison sentences that can run from one day to a lifetime.").[11]

CONCLUSION

For the foregoing reasons, the judgments should be affirmed.

Respectfully submitted,

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September 21, 2004[12]

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[11] The practicality of requiring jury determination of sentencing facts, while judges retain control over sentencing, is demonstrated by the positive experience of Kansas. In the wake of *Apprendi* and a Kansas Supreme Court decision applying *Apprendi* to the Kansas sentencing guidelines, *State* v. *Gould*, 23 P.3d 801, 809-14 (2001), the Kansas legislature enacted legislation requiring a post-conviction jury proceeding to determine any facts that could increase the length of a defendant's sentence. See Kan. Stat. Ann. 21-4718(b) (2003); see also Kansas Sentencing Comm'n Report to the 2002 Kansas Legislature (2002), *reprinted in* 15 FED. SENT. REP. 32 (2002). Cf. Adam Liptak, *Justices' Sentencing Ruling May Have Model in Kansas*, N.Y. TIMES, July 13, 2004, at A12 (quoting a Kansas prosecutor as saying that the new procedure "tacked about an hour onto a four-day trial").

[12] Counsel for *amicus* were assisted by Joshua Block, Allon Kedem, and Steven Wu, students at Yale Law School. Counsel were also assisted by the following students in the Stanford Law School Supreme Court Litigation Clinic: Eric J. Feigin, Daniel S. Goldman, and Mara Silver. Clinic members Michael S. Abate, Clifford L. Reeves, and David Sapp also contributed.

APPENDIX

SELECTED CONGRESSIONAL DIRECTIVES PERTAINING TO THE SENTENCING GUIDELINES

Congressional Directives Amending the Guidelines Directly (4)

Pub. L. No. 108-21, § 104(a), 117 Stat. 653 (2003) (enhancing penalties for kidnapping)

Pub. L. No. 108-21, § 401(b), 117 Stat. 668 (2003) (limiting downward departures for child crimes and sexual offenses)

Pub. L. No. 108-21, § 401(g), 117 Stat. 671 (2003) (limiting the availability of certain acceptance of responsibility reductions)

Pub. L. No. 108-21, Title I, § 401(i), 117 Stat. 672 (2003) (enhancing penalties for certain sexual offenses)

Congressional Directives Prohibiting the Commission from Enacting Certain Types of Amendments (3)

Pub. L. No. 108-21, § 401(j)(2)-(3), 117 Stat. 673 (2003) (prohibiting the Commission from altering certain changes Congress itself wrote into the Guidelines)

Pub. L. No. 108-21, § 504(c), 117 Stat. 682 (2003) (prohibiting the Commission from promulgating amendments that lower the penalties specified by Congress for obscene visual representations of child sexual abuse)

Pub. L. No. 104-38, § 1, 109 Stat. 334 (1995) (rejecting amendments proposed by the Commission relating to crack cocaine and money laundering)

Congressional Directives Mandating Changes to the Guidelines (51)

Pub. L. No. 108-275, § 5, 118 Stat. 833 (2004) (enhancing penalties for identity theft offenses involving abuse of trust)

Pub. L No. 108-21, § 401(m), 117 Stat. 675 (2003) (ordering the Commission to "assure that the incidence of downward departures are substantially reduced")

Pub. L. No. 107-273, § 11009(c), 116 Stat. 1819 (2002) (requiring an enhancement of two levels for offenses involving the use of body armor)

Pub. L. No. 107-155, § 314, 116 Stat. 107 (2002) (specifying enhancements for election law violations)

Pub. L. No. 107-56, § 814(f), 115 Stat. 384 (2001) (stating that the Commission "shall amend" the Guidelines to assure that individuals convicted under 18 U.S.C. 1030 "can be subjected to appropriate penalties, without regard to any mandatory minimum term of imprisonment")

Pub. L. No. 106-420, § 3, 114 Stat. 1868 (2000) (specifying that the penalty for a certain type of fraud should be comparable to the base offense level for another type of fraud)

Pub. L. No. 106-310, § 3611, 114 Stat. 1228 (2000) (requiring that penalties for amphetamine laboratory operators be equivalent to those for methamphetamine laboratory operators)

Pub. L. No. 106-310, § 3612, 114 Stat. 1228 (2000) (specifying enhancements for manufacturing amphetamine and methamphetamine)

Pub. L. No. 106-310, § 3651, 114 Stat. 1238 (2000) (mandating increased penalties for trafficking in list I chemicals)

Pub. L. No. 106-310, § 3663, 114 Stat. 1242 (2000) (mandating increased penalties for trafficking in ecstasy)

Pub. L. No. 105-314, § 502, 112 Stat. 2980 (1998) (mandating enhancement for transportation of persons for illegal sexual activity)

Pub. L. No. 105-314, § 503, 112 Stat. 2980 (1998) (mandating enhancement for using a computer in the sexual abuse or exploitation of a child)

Pub. L. No. 105-314, § 504, 112 Stat. 2980 (1998) (mandating enhancement for misrepresenting the defendant's identity in the sexual abuse or exploitation of a child)

Pub. L. No. 105-314, § 505, 112 Stat. 2980 (1998) (mandating enhancement for a pattern of activity involving the sexual abuse or exploitation of a minor)

Pub. L. No. 105-314, § 506, 112 Stat. 2980 (1998) (mandating that the Commission promulgate amendments clarifying that "distribution of pornography" applies to distribution both for monetary remuneration and nonpecuniary interests)

Pub. L. No. 105-184, § 6, 112 Stat. 521 (1998) (mandating "substantially increased" penalties for telemarketing fraud)

Pub. L. No. 105-147, § 2(g), 111 Stat. 2680 (1997) (mandating that the penalties for electronic copyright infringement be dependent upon the retail value and quantity of the items involved)

Pub. L. No. 105-101, § 2, 111 Stat. 2202 (1997) (mandating an enhancement of at least two levels for offenses against property at national cemeteries)

Pub. L. No. 104-237, § 301, 110 Stat. 3105 (1996) (mandating enhancement for manufacturing and trafficking of methamphetamine)

Pub. L. No. 104-237, § 302(c), 110 Stat. 3105 (1996) (mandating a two-level increase for offenses involving list I chemicals)

Pub. L. No. 104-208, § 203(e), 110 Stat. 3009-566 (1996) (mandating precise enhancements for alien smuggling)

Pub. L. No. 104-208, § 211(b), 110 Stat. 3009-569 (1996) (mandating precise enhancements for fraudulent acquisition and use of government-issued documents)

Pub. L. No. 104-208, § 218(b), (c), 110 Stat. 3009-573, 3009-574 (1996) (mandating amendments to apply specific enhancements for crimes of involuntary servitude)

Pub. L. No. 104-208, § 334, 110 Stat. 3009-635 (1996) (mandating an increase in the base offense level for failure to depart, illegal reentry, and passport and visa fraud)

Pub. L. No. 104-132, § 730, 110 Stat. 1303 (1996) (requiring amendment so that an adjustment for international terrorism applies only to federal crimes of terrorism)

Pub. L. No. 104-132, § 805, 110 Stat. 1305 (1996) (mandating amendment to assure that individuals convicted of terrorist activity damaging a federal interest computer are imprisoned for at least six months)

Pub. L. No. 104-132, § 807(h), 110 Stat. 1308 (1996) (mandating enhancement for conviction of international counterfeiting of United States currency)

Pub. L. No. 104-71, § 2, 109 Stat. 774 (1995) (mandating two-level increases in the base offense level for two statutes involving sex crimes against children)

Pub. L. No. 104-71, § 3, 109 Stat. 774 (1995) (mandating two-level increases in the base offense level for using a computer in committing certain sex crimes against children)

Pub. L. No. 104-71, § 4, 109 Stat. 774 (1995) (mandating a three-level increase in the base offense level for transporting minors across state lines for the purposes of engaging in illegal sexual activity)

Pub. L. No. 103-322, § 80001(b), 108 Stat. 1986 (1994) (mandating amendments to add a "safety valve" to limit the applicability of mandatory minimum sentences for certain drug defendants)

Pub. L. No. 103-322, § 90102, 108 Stat. 1987 (1994) (mandating enhancements for drug-dealing in "drug-free" zones)

Pub. L. No. 103-322, § 90103(b) 108 Stat. 1987 (1994) (mandating enhancement for use or distribution of illegal drugs in the federal prisons)

Pub. L. No. 103-322, § 110501, 108 Stat. 2015 (1994) (mandating enhancement for use of semiautomatic firearm during crime of violence or drug trafficking)

Pub. L. No. 103-322, § 110502, 108 Stat. 2015 (1994) (mandating enhancement for a second offense of using explosive to commit felony)

Pub. L. No. 103-322, § 110512, 108 Stat. 2019 (1994) (mandating enhancement for using firearm in commission of counterfeiting or forgery)

Pub. L. No. 103-322, § 110513, 108 Stat. 2019 (1994) (mandating enhancement for firearms possession by violent felons and serious drug offenders)

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Supreme Court, U.S.
FILED
SEP 12 2004
OFFICE OF THE CLERK

(13) (12)

Nos. 04-104 and 04-105

In The

Supreme Court of the United States

UNITED STATES OF AMERICA, *Petitioner*,

v.

FREDDIE J. BOOKER, *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

UNITED STATES OF AMERICA, *Petitioner*,

v.

DUCAN FANFAN, *Respondent.*

On Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The First Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the principles of *Blakely v. Washington*, 124 S. Ct. 2531 (2004), assimilate readily into practice under the United States Sentencing Guidelines.

TABLE OF CONTENTS

Page

Question Presented i

Table of Authorities iv

Interest of *Amicus Curiae* 1

Summary of Argument 2

Argument 3

The Principles Of *Blakely v. Washington* Assimilate Readily Into Practice Under The United States Sentencing Guidelines 3

A. *Blakely* culminates from a succession of the Court's decisions applying to sentencings the protections of the Fifth and Sixth Amendments 3

B. For over 97% of all federal sentencings – those in which defendants plead guilty or no contest – the sole impact of assimilating *Blakely* into the federal sentencing scheme is that indictments must allege any enhancing facts (other than the fact of a prior conviction) that affect the statutory maximum sentence 6

C. In the remaining 3% of federal sentencings – those following trial – the only additional requirements of *Blakely* are that the prosecution prove the alleged facts beyond a reasonable doubt, that juries be

TABLE OF CONTENTS – Continued

Page

properly instructed on the law, and that verdict forms reflect findings on relevant enhancing facts, all of which are readily accomplished under present procedures 19

D. Rather than cause chaos, applying *Blakely* to guidelines practice enhances the accuracy, integrity, and public reputation of sentencing in federal courts 28

Conclusion 30

TABLE OF AUTHORITIES

Page

CASES

Apprendi v. New Jersey, 530 U.S. 466 (2000) ..... *passim*
Blakely v. Washington, 124 S. Ct. 2531 (2004) ..... *passim*
Carey v. Saffold, 536 U.S. 214 (2002) 1
Cheney v. U.S. Dist. Court for Dist. of Columbia, 124 S. Ct. 2576 (2004) 15
Furman v. Georgia, 408 U.S. 238 (1972) 21
Gardner v. Florida, 430 U.S. 349 (1977) 21
Geders v. United States, 425 U.S. 80 (1976) 26
Gregg v. Georgia, 428 U.S. 153 (1976) 21
In re Olabode, 325 F.3d 166 (3d Cir. 2003) 1
In re Winship, 397 U.S. 358 (1970) 29
Ivan V. v. City of New York, 407 U.S. 203 (1972) 29
Jones v. United States, 526 U.S. 227 (1999) 3, 4, 5, 6
Kowalski v. Tesmer, No. 03-407 (U.S. 2004) 1
Massaro v. United States, 538 U.S. 500 (2003) 1
Newland v. Saffold, 534 U.S. 971 (2001) 1
Old Chief v. United States, 519 U.S. 172 (1997) 26
Overton v. Bazzetta, 539 U.S. 126 (2003) 1
Pacheco-Camacho v. Hood, 535 U.S. 1105 (2002) 1
People v. Reese, 179 N.E. 305 (N.Y. 1932) 29
Ring v. Arizona, 536 U.S. 584 (2002) 4, 5, 6
Ross v. Bernhard, 396 U.S. 531 (1970) 20
Russell v. United States, 369 U.S. 749 (1962) 7
Schiro v. Farley, 510 U.S. 222 (1994) 21
Speiser v. Randall, 357 U.S. 513 (1958) 29
Stirone v. United States, 361 U.S. 212 (1960) 7
United States v. Arvizu, 534 U.S. 266 (2002) 1

TABLE OF AUTHORITIES – Continued

Page

United States v. Beard, 313 F. Supp. 844 (D. Minn. 1970) 20
United States v. Carlos Cardenas, et al., Case No. 03-20450-CR-GOLD(s) (S.D. Fla.), *available at* http://pacer.flsd.uscourts.gov 24
United States v. Carlson, 423 F.2d 431 (9th Cir. 1970) .. 27
United States v. Richard Casseus and Shretta Renee Casseus, No. 04-20047-CR-MARTINEZ (s) (S.D. Fla. July 29, 2004), *available at* http://pacer.flsd.uscourts.gov 13
United States v. Richard A. Causey, Jeffrey K. Skilling, and Kenneth L. Lay, Cr. No. H-04-25(S-2) (S.D. Tex. July 29, 2004), *available at* http://news.findlaw.com/hdocs/docs/enron/usvlay70704 ind.pdf. 13
United States v. Climatemp, Inc., 482 F. Supp. 376 (N.D. Ill. 1979), *aff'd mem.*, 705 F.2d 461 (7th Cir.), *cert. den. sub nom. Fakter v. United States*, 462 U.S. 1134 (1983) 9
United States v. Cotton, 535 U.S. 625 (2002) 4, 5, 6, 7, 11, 16, 24
United States v. Finestone, 816 F.2d 583 (11th Cir. 1987) 22
United States v. Gonzalez, 921 F.2d 1530 (11th Cir. 1991) 22, 23
United States v. Greenpeace, Inc., 314 F. Supp. 2d 1252 (S.D. Fla. 2004) 20
United States v. Jackson, 390 U.S. 570 (1968) ... 20, 21, 22
United States v. Joshua, 976 F.2d 844 (3d Cir. 1992) . 26-27
United States v. Kaplan, 886 F.2d 536 (2d Cir. 1989) 22
United States v. Kemper, 503 F.2d 327 (6th Cir. 1974) 8

TABLE OF AUTHORITIES – Continued

Page

United States v. LaBonte, 520 U.S. 751 (1997) 14, 15
United States v. McNeese, 901 F.2d 585 (7th Cir. 1990) .. 23
United States v. Neapolitan,
791 F.2d 489 (7th Cir. 1986) 22
United States v. Scop, 940 F.2d 1004 (7th Cir. 1991) . 22, 23
United States v. Stassi, 544 F.2d 579 (2d Cir. 1976) 23
United States v. Taylor, 17 F.3d 333 (11th Cir. 1994) . 22, 23
United States v. Russell Wallace, No. 04-14034-CR-MARRA/LYNCH (s) (S.D. Fla. Aug. 5, 2004), *available at* http://pacer.flsd.uscourts.gov 14
United States v. Joseph E. Williams, No. 04-160-A, *available at* http://pacer.vaed.uscourts.gov 13
United States v. Vonn, 535 U.S. 55 (2002) 1
United States v. Young, 470 U.S. 1 (1985) 18
Woodson v. North Carolina, 428 U.S. 280 (1976) 21
Zafiro v. United States, 506 U.S. 534 (1993) 26

CONSTITUTION, STATUTES, AND RULES

U.S. Const. art. III, § 2. 19
U.S. Const. amend. V 3, 5, 7
U.S. Const. amend. VI 1, 3, 5, 19

Sentencing Reform Act of 1984, Pub. L. No. 98-473, Title II, Ch. II, 98 Stat. 1837 (Oct. 12, 1984) 2, 27
18 U.S.C. § 924 22
18 U.S.C. § 3006A 1
21 U.S.C. § 841 ..... 7, 11
21 U.S.C. § 846 7
21 U.S.C. § 851 15

TABLE OF AUTHORITIES – Continued

Page

Sup. Ct. R. 37.3 1
Sup. Ct. R. 37.6 1

Fed. R. Crim. P. 7 7-8
Fed. R. Crim. P. 11 15
Fed. R. Crim. P. 14 26
Fed. R. Crim. P. 23 19-20
Fed. R. Crim. P. 29 28
Fed. R. Crim. P. 32 28
Fed. R. Crim. P. 33 28
Fed. R. Crim. P. 34 28

Fed. R. Evid. 403 26
Fed. R. Evid. 404 23
Fed. R. Evid. 611 26

U.S. SENTENCING GUIDELINES AND PUBLICATIONS

United States Sentencing Commission, *Guidelines Manual* (Nov. 2003) 23, 27
U.S.S.G. § 1A1.1 27
U.S.S.G. § 2D1.1 ..... 11, 12, 17, 24
U.S.S.G. § 3A1.1 24
U.S.S.G. § 3B1.1 12
U.S.S.G. § 3C1.1 17
U.S.S.G. § 3E1.1 17
U.S.S.G. § 5C1.2 17
U.S.S.G. § 5G1.1 28
U.S.S.G. § 6A1.3, p.s. 27

TABLE OF AUTHORITIES – Continued

Page

United States Sentencing Commission, *Sourcebook of Federal Sentencing Statistics* (1995 - 2002) 6, 16, 17, 28

TREATISES AND MANUALS

Department of Justice Manual (Aspen Law & Business 2002) 8, 9
Moore's Federal Practice, Criminal Procedure (3d ed. 2004) 23
Weinstein on Evidence (2d ed. 2004) 22, 23
Charles Alan Wright, *Federal Practice and Procedure: Criminal* (3d ed. 1999) 7, 8

OTHER

ABA Model Code of Professional Responsibility (1980) . 18
ABA Model Rules of Professional Conduct (1984) 18
ABA Standards for Criminal Justice (2d ed. 1980) 18
Brief for United States, *United States v. Cotton*, 535 U.S.625 (2002) (No. 01-687) 7
Memorandum from James Comey, Deputy Attorney General, U.S. Department of Justice, to All Federal Prosecutors, re: Department Legal Positions and Policies in Light of *Blakely v. Washington* (July 2, 2004), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/dag_blakely_memo_7204.pdf 10

TABLE OF AUTHORITIES – Continued

Page

Memorandum from Christopher A. Wray, Assistant Attorney General, U.S. Department of Justice, Criminal Division, to All Federal Prosecutors, re: Guidance Regarding the Application of *Blakely v. Washington*, 2004 WL 1402697 (June 24, 2004), to Pending Cases (undated), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/chris_wray_doj_memo.pdf 11, 12

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Federal Defenders was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The Association is a nationwide, non-profit, volunteer organization whose membership includes attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act.

One of the guiding principles of the Association is to promote the fair administration of justice by appearing as *amicus curiae* in litigation relating to criminal law issues, particularly as those issues affect indigent defendants in federal court. The Association has appeared as *amicus curiae* in litigation before the Supreme Court and the federal courts of appeals.[2]

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[1] No counsel for any party has authored this brief in whole or in part, and no person or entity, other than the National Association of Federal Defenders, its members or its counsel, made any monetary contributions to its preparation or submission. *See* Sup. Ct. R. 37.6. The parties have consented to the filing of this brief, and letters of consent have been lodged with the Clerk of the Court, in accordance with Sup. Ct. R. 37.3(a).

[2] Published decisions in which the Association has appeared as *amicus curiae* include: *Overton v. Bazzetta*, 539 U.S. 126 (2003); *Massaro v. United States*, 538 U.S. 500 (2003); *Carey v. Saffold*, 536 U.S. 214 (2002); *Pacheco-Camacho v. Hood*, 535 U.S. 1105 (2002) (*mem.*); *United States v. Vonn*, 535 U.S. 55 (2002); *United States v. Arvizu*, 534 U.S. 266 (2002); *Newland v. Saffold*, 534 U.S. 971 (2001); and *In re Olabode*, 325 F.3d 166 (3d Cir. 2003). The Association also appears as *amicus curiae* in *Kowalski v. Tesmer*, No. 03-407, presently pending before the Court.

The pending cases raise important questions that impact federal criminal practice, from indictment through trial – or, as is much more often the case, through plea negotiation – and sentencing under the United States Sentencing Guidelines. As *amicus curiae*, the Association offers its practical view of the federal criminal justice system, seen through the eyes of counsel who represent a majority of those charged with federal crimes in districts throughout every federal circuit.

SUMMARY OF ARGUMENT

Opponents of *Blakely v. Washington,* 124 S. Ct. 2531 (2004), raise the spectre of chaos as a reason to revisit the decision or to hold it inapplicable to the federal sentencing scheme. For those who practice criminal law in the federal courts every day, the only chaos has been caused not by applying *Blakely* to federal criminal cases, but rather by those trying to avoid its application or to force its reconsideration.

The requirements of *Blakely* are assimilated readily into the federal sentencing scheme, with little or no change to current statutes or rules, providing sentences entirely consistent with the Sentencing Reform Act of 1984 and the United States Sentencing Guidelines. For over 97% of federal sentencings – those arising from guilty pleas – the only change required by *Blakely* is that indictments must now allege any fact (other than the fact of a prior conviction) that increases the statutory maximum penalty. There are no structural or practical impediments to this requirement, which has already been satisfied in districts throughout the country.

Nor are there legal or practical impediments to assimilating *Blakely* in the small percentage of cases that go to trial. Trial

juries will be empaneled, hear proof, and return verdicts, based on a reasonable doubt standard. With such verdicts, the trial court actually has simpler sentencing obligations, filtered by the jury's findings, which will yield the appropriate guideline range.

Real-world experience dispels the myths imagined by those who choose to avoid *Blakely* and its application in federal sentencings. In the end, *Blakely* will improve federal guidelines sentencing by increasing the accuracy of factfinding, reducing unwarranted sentencing disparities, and enhancing the public reputation of the federal sentencing process.

ARGUMENT

THE PRINCIPLES OF *BLAKELY V. WASHINGTON* ASSIMILATE READILY INTO PRACTICE UNDER THE UNITED STATES SENTENCING GUIDELINES

A. *Blakely* culminates from a succession of the Court's decisions applying to sentencings the protections of the Fifth and Sixth Amendments.

Blakely v. Washington, 124 S. Ct. 2531 (2004), is the culmination of five decisions delivered by the Court during the past five years, reiterating that sentencing in criminal cases must operate within the limits of the Fifth and Sixth Amendments. Each decision built on its predecessors and brought gre r clarity to the requirements imposed by these constitutiona. provisions.

In *Jones v. United States*, 526 U.S. 227 (1999), the Court stated that the Fifth Amendment's Due Process Clause and the Sixth Amendment's notice and jury trial guarantees require that

"any fact (other than prior conviction) that increases the maximum penalty for a federal crime must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt." 526 U.S. at 243 n.6.

Apprendi v. New Jersey, 530 U.S. 466 (2000), followed a year later, and applied the constitutional principle announced in *Jones* to state court sentencing: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. Two years later, the Court made clear that, in applying *Apprendi* "[i]n federal prosecutions, such facts must also be charged in the indictment." *United States v. Cotton*, 535 U.S. 625, 627 (2002). During that same Term, in *Ring v. Arizona*, 536 U.S. 584 (2002), the Court applied *Apprendi* to death penalty determinations.

And last Term, *Blakely v. Washington* refined and applied *Apprendi*'s rule, defining "statutory maximum" in a determinate sentencing scheme as "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" 124 S. Ct. at 2537 (emphasis in original). It "is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." 124 S. Ct. at 2537. To the extent a judge sentences above the statutory maximum, based on facts not found by a jury (or conceded by the defendant), "the judge exceeds his proper authority." *Id.*

As the Court decided each case, a gradually increasing chorus of doomsayers predicted chaotic courtrooms and the demise of determinate sentencing schemes. Yet, the culmination

of the decisions, and their application to federal sentencing, brings neither chaos nor the guidelines' demise. To the contrary, *Apprendi* jurisprudence does not inexorably overrule determinate sentencing, but simply causes it to be "implemented in a way that respects the Sixth Amendment," *Blakely*, 124 S. Ct. at 2540, by processes for which the criminal justice system is well-suited.

Together, *Jones*, *Apprendi*, *Cotton*, *Ring*, and *Blakely* recognize four important Fifth and Sixth Amendment principles applicable to federal sentencing:

> First, enhancing facts that increase the statutory maximum sentence must be alleged in the indictment.
>
> Second, the government must prove those allegations – like any other allegations of an indictment – beyond a reasonable doubt.
>
> Third, the jury must find the existence of the facts beyond a reasonable doubt.
>
> Fourth, a court may not sentence a convicted defendant in excess of the statutory maximum for any fact not indicted, proved beyond a reasonable doubt, and found by a jury verdict.[3]

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[3] The four principles have these caveats: If the fact is indicted and its proof conceded by the defendant, further proof and jury finding on that factor are unnecessary, and a sentencing judge may take the fact into account in imposing a sentence above the statutory maximum. *Blakely*, 124 S. Ct. at 2541. Likewise, a defendant may consent to judicial factfinding in place of a jury determination. *Id.*

Each of these principles is readily applied under the United States Sentencing Guidelines, although in the real world, only the first principle has universal application.

B. For over 97% of all federal sentencings – those in which defendants plead guilty or no contest – the sole impact of assimilating *Blakely* into the federal sentencing scheme is that indictments must allege any enhancing facts (other than the fact of a prior conviction) that affect the statutory maximum sentence.

The overwhelming majority of federal prosecutions are resolved by guilty or no contest pleas. According to the most recent available statistics, 97.1% of all federal sentencings follow guilty pleas, with the remaining 2.9% following trial.[4] This striking contrast is not new, but rather is part of a long-term trend,[5] a trend that has continued – indeed accelerated – despite the assimilation of the Court's decisions in *Jones*, *Apprendi*, *Cotton* and *Ring*. This reality must be considered in gauging the true impact of now assimilating *Blakely* into the federal sentencing scheme.

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[4] U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics* (2002) (Table 11).

[5] During the past decade, the percentage of pleas has increased from 91.9% in 1995, to 97.1% in 2002. Remarkably, the concomitant reduction in trial dispositions – from 8.1% to 2.9% – has occurred despite the application of *Apprendi*'s requirements to federal drug trafficking prosecutions. *Compare* U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics* (1995) (Table 3) *with id.* (2002) (Table 11).

Guilty plea dispositions implicate only one of *Blakely*'s requirements: An indictment must allege all enhancing facts (other than the fact of a prior conviction) that might affect the statutory maximum sentence. Despite the naysayers' protestations, there are neither legal nor practical impediments to *Blakely*-ized indictments.

Federal Rule of Criminal Procedure 7 implements the requirement of the Fifth Amendment's indictment clause. 1 Charles Alan Wright, *Federal Practice and Procedure: Criminal* § 125 (3d ed. 1999). The rule "put an end to 'the rules of technical and formalized pleading which had characterized an earlier era,'" *id.* § 123, at 529 (quoting *Russell v. United States*, 369 U.S. 749, 762 (1962)), replacing those arcane requirements with a simplified procedure in which "common sense and reason prevail over technicalities." *Id.* § 123, at 530-31. The rule requires an indictment or information to be "a plain, concise, and definite written statement of the *essential facts* constituting the offense charged." Fed. R. Crim. P. 7(c)(1) (emphasis added). Although the rule requires that elements of the charged crime be included, there is no prohibition on including relevant and material non-elemental facts.[6]

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[6] The rule accords with the Constitution, which, far from barring indictment allegations other than those elements contained in the statute, sometimes requires them. *See, e.g.*, *Russell*, 369 U.S. at 765 (requiring more than statutory language to provide required notice); *cf. Stirone v. United States*, 361 U.S. 212 (1960) (only grand jury may change allegation of means of committing offense); Brief for United States at 16 n.4, *United States v. Cotton*, 535 U.S. 625 (2002) (No. 01-687) ("The conclusion that under *Apprendi* threshold drug quantities must be charged in a federal indictment and proved to the jury in order to support a sentence above the otherwise-applicable statutory maximum does not require a determination that drug quantity is formally an 'element' of the offense under Section 841 or Section 846.").

Subsection (d), which permits surplusage to be stricken from the indictment upon motion of the defendant, is "strictly construed against striking surplusage," *United States v. Kemper*, 503 F.2d 327, 329 (6th Cir. 1974), and for that reason "only rarely has surplusage been stricken." Wright, *supra*, § 127, at 639. By design and by its terms, the rule is one of inclusion and simplification, not exclusion for the sake of complication. Indeed, that has long been the view of the U.S. Department of Justice in its policy and practice.

The *Department of Justice Manual* recognizes that proper allegations in an indictment are not limited to only the statutory elements of an offense. *See* 3 *Department of Justice Manual*, Title 9, Resource Manual, Criminal, No. 214 (Drafting Indictments and Informations) (Aspen Law & Business 2002). It offers prosecutors no fewer than five separate form responses to defense motions to strike surplusage, each setting forth law and argument permitting non-elemental facts to be alleged in an indictment. *See* 2 *id.*, Resource Manual, Title 4, Civil, Nos. 127, 128, 129, 130, 133. Many of the boilerplate legal responses demonstrate, through law and argument, why the types of enhancing facts that *Blakely* affects are eligible for inclusion in an appropriate indictment simply because they are "legally relevant." *Id.* at 4-530, 4-533. Examples of permissible non-elemental allegations include background information, like "reference to the Bonanno family of La Cosa Nostra," "anti-bugging equipment," or "organized crime;" relevant conduct, such as "allegations of drug trafficking and narcotics transactions in a mail fraud indictment," or "references to an inmate awaiting trial for narcotics offense;" victim impact, like "allegations that the diverted funds were destined for the poor and homeless and that rightful recipients were lulled and deceived;" and leadership and other roles in the offense, like "a Means and Manners section . . . explaining the . . . roles of each

defendant within the organization." *Id.* at 4-528, 4-531, 4-533, 4-536, 4-537. These and many other non-elemental allegations were upheld, at the government's urging, because they were "legally relevant" and "material." Of the many cases cited in the form government responses, the one relied upon most often is *United States v. Climatemp, Inc.*, 482 F. Supp. 376, 391 (N.D. Ill. 1979), *aff'd mem.*, 705 F.2d 461 (7th Cir.), *cert. den. sub nom. Fakter v. United States*, 462 U.S. 1134 (1983), which the government summarizes as: "[I]ndictment language the government hopes to prove at trial cannot be considered surplusage, no matter how prejudicial it may be, if it is legally relevant." Resource Manual, Title 4, Civil, at 4-529, 4-533.

In this light, one cannot seriously suggest that enhancing facts relating to drug quantity, financial loss or gain, role in the offense, victim status, or relevant conduct are surplusage in an indictment when proof of those facts determines the degree of punishment in the event of conviction.

Actual practice confirms this conclusion. After the Court decided *Blakely*, the Department of Justice issued to all federal prosecutors at least two memoranda, one from Deputy Attorney General James Comey and the other from Assistant Attorney General Christopher A. Wray, offering guidance on post-*Blakely* practices.[7] "Until the Supreme Court definitively rules on the constitutional impact of *Blakely* on the Guidelines," the Comey memorandum directs all federal prosecutors to conform indictment practices to *Blakely*:

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[7] Although the Wray memorandum cautions in a footnote that it should not be disseminated outside of DOJ, it is posted publicly on the Internet at http://sentencing.typepad.com and has been made available to the federal judiciary on the JNET, http://jnet.ao.dcn/Memos/2004_Archive/Dir4092.html.

1. Indictments. Prosecutors should immediately begin to include in indictments all readily provable Guidelines upward adjustment or upward departure factors (except for prior convictions that are exempt from the *Blakely* and *Apprendi* rules). . . . [I]n light of the unpredictable future path of court rulings, it is prudent for the government to protect against the possibility that such allegations in indictments will be held necessary.

2. Superseding indictments. In pending prosecutions that have not resulted in a plea of guilty or a trial, prosecutors should obtain superseding indictments that allege all readily provable Guidelines upward adjustment or upward departure factors (except for prior convictions that are exempt from the *Blakely* and *Apprendi* rules).

Memorandum from James Comey, Deputy Attorney General, U.S. Department of Justice, to All Federal Prosecutors, re: Department Legal Positions and Policies in Light of *Blakely v. Washington* (July 2, 2004), at 3, *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/dag_blakely_memo_7204.pdf.

The second memorandum, issued only a few days later, offered the same advice in greater detail and made a candid admission about the government's ability to adapt to *Apprendi*'s indictment requirements:

> **Procedures That *Blakely* Would Require.** Any fact to which *Blakely* applies must be charged in the indictment, and either found by a jury beyond a reasonable doubt or admitted by the defendant. *Blakely*,

> 2004 WL 1402697, at *4; *United States v. Cotton*, 535 U.S. 625, 627 (2002) (indictment requirement applies in federal prosecution).
>
> After *Apprendi* was decided, we were able to reduce the impact of the decision by immediately beginning to charge and prove to the jury facts that increase the statutory maximum – for example, drug type and quantity for offenses under 21 U.S.C. 841.

Memorandum from Christopher A. Wray, Assistant Attorney General, U.S. Department of Justice, Criminal Division, to All Federal Prosecutors, re: Guidance Regarding the Application of *Blakely v. Washington*, 2004 WL 1402697 (June 24, 2004), to Pending Cases (undated), at 8, *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/chris_wray_doj_memo.pdf. To that end, the Wray memorandum directed prosecutors on the procedures for *Blakely*-izing indictments and informations:

> **A. Indictments and Informations.** Prosecutors should immediately begin to include in indictments all Guidelines upward adjustment or upward departure factors (except for prior convictions that are exempt from *Blakely* and *Apprendi* rules) that are readily provable beyond a reasonable doubt. Facts that will need to be alleged may include Chapter Two factors that determine the base offense level (including relevant conduct), Chapter Two specific offense characteristics, Chapter Three upward adjustments, and Chapter Five departure grounds. In a drug case, for example, this might include the quantity of drugs as set forth in the drug quantity table of Guidelines § 2D1.1(c) (for example, that the defendant distributed at least 2 kg but

less than 3.5 kg of cocaine, which would result in an offense level of 28), that a dangerous weapon was possessed (Guidelines § 2D1.1(b)(1)) and that the defendant was an organizer or leader of criminal activity that involved five or more participants (Guidelines § 3B1.1(a)). Prior convictions do not need to be alleged in the indictment, but prosecutors should allege facts other than prior convictions that increase a defendant's criminal history score and are readily provable beyond a reasonable doubt. The allegations of enhancement factors should track the language of the applicable Sentencing Guidelines. Prosecutors may also choose to allege Guidelines enhancements in informations where the defendant has agreed to enter a guilty plea and to waive indictment, but has not agreed to waive his *Blakely* rights.

> If a defendant has already been indicted but has not yet gone to trial or pleaded guilty, prosecutors should supersede the indictment to allege Guidelines factors. The Criminal Division will prepare and distribute sample indictments.

Id. at 9.

Indictments complying with *Blakely*'s requirements (and DOJ policy) have been returned nationwide, from the prosecution of the biggest and most infamous fraud case to the most obscure and routine cases. For example, the superseding indictment in the Enron fraud prosecution, 132 numbered paragraphs spanning 65 pages, concludes with four paragraphs identifying a smorgasbord of enhancements: leadership role, abuse of trust, special skills, facilitation to conceal, loss amount exceeding $100 million, more than minimal planning, a scheme

to defraud more than 50 victims, sophisticated means, commission through mass marketing, offenses affecting a financial institution, gross receipts of over $1 million; funds values in excess of $6 million; and, as to counts 38-41, gain exceeding $60 million, and more than minimal planning. *United States v. Richard A. Causey, Jeffrey K. Skilling, and Kenneth L. Lay*, Cr. No. H-04-25(S-2) (S.D. Tex. July 7, 2004), *available at* http://news.findlaw.com/hdocs/docs/enron/usvlay70704 ind.pdf.

More routine cases provide everyday examples of *Blakely*'s application to superseding indictments. In a two-defendant, eight-count tax fraud prosecution, the superseding indictment concludes with eight double-spaced lines alleging that the defendants had a leadership role in criminal activity involving "less than five members" that "was not otherwise extensive;" the defendants were in the business of preparing tax returns; and their conduct resulted in loss exceeding $80,000.00. *United States v. Richard Casseus and Shretta Renee Casseus*, No. 04-20047-CR-MARTINEZ (s) (S.D. Fla. July 29, 2004), *available at* http://pacer.flsd.uscourts.gov (Local Option Images).

In a single-defendant, two-count prosecution charging the defendant with being both a felon and an unlawful drug user in possession of a firearm and ammunition, each count of the second superseding indictment makes the traditional charge and adds enhancement fact allegations that the possession was "in connection with a robbery and a first degree and second degree murder, including felony murder." *United States v. Joseph E. Williams*, No. 04-160-A (E.D. Va. July 15, 2004) (on file with counsel), *available at* http://pacer.vaed.uscourts.gov.

And, in a one-count superseding indictment for interstate transportation of pornography involving minors, the

government added factual allegations that raise the guideline range because the material involved a prepubescent minor under the age of 12 years, distribution to a minor, the material portrayed sadistic and masochistic conduct and other depictions of violence, and because distribution was committed by use of a computer. All of the enhancing facts were alleged in a total of nine double-spaced lines. *United States v. Russell Wallace*, No. 04-14034-CR-MARRA/LYNCH (s) (S.D. Fla. Aug. 5, 2004), *available at* http://pacer.flsd.uscourts.gov (Local Option Images).

These few selected indictments illustrate a wealth of facts that, if proved beyond a reasonable doubt, would raise the statutory maximum sentence set by the U.S. Sentencing Guidelines. And they illustrate how simply and routinely *Blakely* has already assimilated into practice in federal court.

To the extent a defendant faces punishment beyond the otherwise applicable maximum, it will be because the grand jury and the prosecutor determined it is warranted. If the enhancing facts are not part of the ultimate charge and sentence, it will be because the grand jury found proof of the enhancing fact wanting, or due to the exercise of prosecutorial discretion. As the Court observed in *United States v. LaBonte*, 520 U.S. 751 (1997), such prosecutorial discretion remains a vital component within the federal guidelines scheme:

> Insofar as prosecutors, as a practical matter, may be able to determine whether a particular defendant will be subject to the enhanced statutory maximum, any such discretion would be similar to the discretion a prosecutor exercises when he decides what, if any, charges to bring against a criminal suspect. Such discretion is an integral feature of the criminal justice system, and is appropriate, so long as it is not based upon improper factors.

520 U.S. at 761-62; *see also Cheney v. U.S. Dist. Court for Dist. of Columbia*, 124 S. Ct. 2576, 2590 (2004) ("The decision to prosecute a criminal case, for example, is made by a publicly accountable prosecutor subject to budgetary considerations and under an ethical obligation, not only to win and zealously to advocate for his client but also to serve the cause of justice. The rigors of the penal system are also mitigated by the responsible exercise of prosecutorial discretion.").[8]

Thus, the first requirement of *Blakely*, that enhancement facts should be charged by indictment, is legally permissible and practicable. For the 97% of federal cases in which defendants plead guilty or no contest, the other requirements of *Blakely* are met by virtue of their plea. Under Federal Rule of Criminal Procedure 11(b)(1), defendants who plead guilty will be advised of the nature of the charges against them, their rights to jury trial and procedures to defend against the charges, and that their plea waives all of those rights. When the district court accepts the plea under the terms of Rule 11, the remaining requirements of *Blakely* – a jury trial with proof of all

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[8] *Labonte*'s recognition of prosecutorial discretion also disposes of any concern that *Blakely* will cause unseemly sentencing disparity because some defendants will be indicted for enhancement conduct whereas others will not. *Labonte* addressed this argument in the context of the comparable effect of 21 U.S.C. § 851(a)(1) enhancement notices. Rejecting the significance of the similar disparity created because some defendants receive enhancement notices while others do not, the Court relied upon traditional precepts of prosecutorial discretion: "Any disparity in the maximum statutory penalties between defendants who do and those who do not receive the notice is a foreseeable – but hardly improper – consequence of the statutory notice requirement." 520 U.S. at 762.

allegations of the indictment beyond a reasonable doubt – are waived and the sentencing proceeds within the limits of crimes and factors alleged in the indictment. *See Blakely*, 124 S. Ct. at 2541.

Those who predict chaos rejoin by predicting that *Blakely* will cause an increase in trials and a decrease in plea negotiations. Although such concerns cannot override constitutional requirements, *see Blakely*, 124 S. Ct. at 2543, the claim itself is statistically unfounded and counterintuitive. Despite *Apprendi*, which required new allegations and proof in federal prosecutions, the number and percentage of criminal trials have *decreased*, not increased. *See supra* note 5. The most dramatic effect of *Apprendi* has been on federal drug prosecutions, *see Cotton*, yet trials have decreased even in those cases. *Apprendi* was decided on June 26, 2000. In the prior year, 1999, there were 1,359 drug trafficking trials, 6.2% of all such cases. The remaining 93.8% of cases were resolved by plea. *Sourcebook of Federal Sentencing Statistics* (Table 11) (1999). In each year since, the number and percentage of trials declined. By 2002, there were only 766 drug trafficking trials nationwide, 3% of such cases. *Id.* (2000 - 2002).[9] This reduction in trials

[9] The reduction in drug trafficking trials is a consistent downtrend, not a snapshot anomaly:

Primary Offense: Drugs - Trafficking

FY	Total	Plea		Trial	
		Number	Percent	Number	Percent
1999	21,840	20,481	93.8%	1,359	6.2%
2000	23,195	22,011	94.9%	1,184	5.1%
2001	24,016	23,204	96.6%	812	3.4%
2002	25,361	24,595	97.0%	766	3.0%

Sourcebook of Federal Sentencing Statistics (Table 11) (1999 - 2002).

occurred even though the overall number of drug trafficking prosecutions increased, from 21,840 in 1999, to 25,361 in 2002. These statistics belie the myth that *Apprendi*-specific indictments will lead to catastrophic increases in federal court workloads. To the contrary, if any conclusion may be drawn from the data, it is that such indictments more sharply focus the issues in ways that contribute to successful plea negotiations.[10]

Not only is the thought that *Blakely* will increase trials statistically unsupported, but it is also counterintuitive, as the Guidelines continue to offer significant benefits for those defendants who accept responsibility for their criminal involvement.[11] Some would say these benefits are penalties, because they are withheld from most who elect trial over plea, and those who go to trial are further penalized if their evidence is disbelieved.[12] But, whether viewed as benefits or penalties, they serve to discourage frivolous demands for trial. Moreover, explicit indictments are more likely to encourage plea

[10] This is not to say that federal courts lack capacity to conduct additional criminal trials. While federal courts conducted 1,851 criminal trials in 2002, fewer judges conducted 2,958 criminal trials in 1999 and 3,124 in 1995. *Sourcebook of Federal Sentencing Statistics* (2002) (Table 10); *id.* (1999) (Table 10); *id.* (1995) (Table 16).

[11] *See, e.g.*, U.S.S.G. § 3E1.1 (permitting 2-level reduction in offense level for demonstrating acceptance of responsibility and an additional 1-level reduction for timely notifying authorities of the intention to plead guilty); *id.* §§ 2D1.1(b)(6), 5C1.2 (safety valve, permitting a 2-level offense level reduction and a sentence below a mandatory minimum sentence for qualifying defendants who truthfully disclose all information and evidence concerning offenses part of the same course of conduct).

[12] *See* U.S.S.G. § 3C1.1 (permitting 2-level increase in offense level for obstruction or impeding the administration of justice, including offering false testimony at trial).

negotiations, and to permit the parties to compromise on enhancing facts when proof of a single fact is inadequate or questionable, without fear that the issue will re-emerge in a presentence report written by a non-lawyer probation officer unfamiliar with the realities of trial, rules of evidence, subtleties of proof, and ethical constraints imposed upon the prosecutor as a "minister of justice."[13]

A defendant's election to plead guilty or to stand trial is influenced not by the specificity of the indictment, but rather by the certainty and magnitude of punishment set forth in the Guidelines. Before *Apprendi* was decided, that certainty was often lacking for defendants in drug cases, who "would routinely see [their] maximum potential sentence balloon from as little as five years to as much as life imprisonment . . . based . . . on facts extracted after trial from a report compiled by a probation officer . . . ." *Blakely*, 124 S. Ct. at 2542. The increased specificity that *Apprendi* required led to greater certainty, and, as a result, enhanced opportunities for knowing

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[13] *See, e.g., United States v. Young*, 470 U.S. 1, 26 (1985) (Brennan, Marshall, Blackmun, JJ., concurring in part and dissenting in part) ("[W]e have long emphasized that a representative of the United States Government is held to a *higher* standard of behavior:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done . . . .

(*Cf.* ABA Model Rules of Professional Conduct, Rule 3.8 comment (1984) ('A prosecutor has the responsibility of a minister of justice and not simply that of an advocate'); ABA Model Code of Professional Responsibility EC 7-13 (1980) (prosecutor owes a 'special duty'); ABA Standard for Criminal Justice 3-5.8, p. 3•88 (2d ed. 1980)").

settlement. After *Blakely*, the indictment must include other facts that increase the statutory maximum, thus providing even greater certainty. Given past experience, there is no reason to believe that *Blakely*-specific indictments will cause an increase – much less a catastrophic increase – in trials; rather, the more specific allegations give the parties specific details with which to reach successful compromise and negotiations.

C. In the remaining 3% of federal sentencings – those following trial – the only additional requirements of *Blakely* are that the prosecution prove the alleged facts beyond a reasonable doubt, that juries be properly instructed on the law, and that verdict forms reflect findings on relevant enhancing facts, all of which are readily accomplished under present procedures.

The remaining 3% of sentencings will likely follow a jury or non-jury trial. In some of those cases, the prosecution will offer proof of enhancing facts and the jury will be instructed to make relevant findings on its verdict form. Commentators have speculated wildly about the difficulties attendant to these requirements, but there are neither legal nor practical impediments to *Blakely*-ized trials.

The Constitution has two provisions relating to criminal trials. The first is in the article allocating federal judicial power: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." U.S. Const. art. III, § 2. The second is in the Bill of Rights: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. Const. amend. VI. These provisions are given effect by Federal Rule of Criminal Procedure 23: "If the defendant is entitled to a jury trial, the trial must be by a jury" unless waived by the

defendant with the consent of the government and the court's approval. Absent waiver, *Blakely* entitles a defendant to a jury trial to decide enhancing facts that increase the statutory maximum, so, by their terms, the Constitution and rules authorize such a proceeding.

In addition, "[n]othing in the Constitution or the Rules precludes the judge from granting a jury trial as a matter of discretion." *Ross v. Bernhard*, 396 U.S. 531 (1970) (Stewart, Burger, Harlan, JJ., dissenting); *United States v. Greenpeace, Inc.*, 314 F. Supp. 2d 1252 (S.D. Fla. 2004) (Jordan, J.) (granting jury trial, as a matter of discretion, for organization charged with misdemeanor, based on review and discussion of historical precedent); *United States v. Beard*, 313 F. Supp. 844, 846 (D. Minn. 1970) (Neville, J.) (the "granting of a jury trial rests within the court's discretion" where petty offense defendants have no constitutional right to jury trial and Congress has not spoken on subject).

The government relies on *United States v. Jackson*, 390 U.S. 570 (1968), for a contrary view. Pet'r Br. at 60-61. *Jackson*, however, is distinguishable in many ways that leave it with little weight or precedential value in this setting. *Jackson* held unconstitutional a federal death penalty law that could only be imposed upon those convicted of kidnaping after trial, but not on those who pleaded guilty. In an effort to salvage the federal statute, the government suggested that those who plead guilty should, despite their objection and the fact that Congress had not authorized such a procedure, be subjected to a death penalty phase jury. The Court rejected the government's attempt to create out of whole cloth a procedure to impose the death penalty on those who plead guilty.

In nearly every respect, *Jackson* differs from *Blakely*. Most prominently, *Jackson* was about the power of a court to empanel a jury *after* a guilty plea; *Blakely* requires no such procedure. Nothing *Blakely* requires occurs outside of the traditional setting of a criminal proceeding, whereas the government's rejected salvage in *Jackson* attempted to create a unique post-guilty plea sentencing jury for which Congress made no provision. In short, assimilating *Blakely* does not require that new sentencing juries be created out of whole cloth; it merely requires that when defendants elect trial instead of plea, the jury's factfinding include certain facts that may influence the statutory maximum sentence in the event of conviction.

In addition, *Jackson* has little bearing in a non-death penalty setting, as the ruling certainly derives from the Court's "death is different" jurisprudence of that era.[14] In *Jackson*, the government wanted the post-guilty plea jury empaneled to impose a punishment "different in kind from any other punishment imposed under our system of criminal justice." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); under *Blakely*, the jury decides if the statutory maximum sentencing range for a single type of punishment should be higher or lower. Under *Jackson*, the jury was to be empaneled as a sword, to invoke a different and much more serious penalty; under *Blakely*, the

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[14] *See Schiro v. Farley*, 510 U.S. 222, 237 (1994) (Blackmun, J., dissenting) ("The 'unique' nature of modern capital sentencing proceedings . . . derives from the fundamental principle that death is 'different,' *see, e.g., Gardner v. Florida*, 430 U.S. 349, 357, 97 S. Ct. 1197, 1204, 51 L. Ed. 2d 393 (1977) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S. Ct. 2978, 2992, 49 L. Ed. 2d 944 (1976) (plurality opinion); *see also Furman v. Georgia*, 408 U.S. 238, 306, 92 S. Ct. 2726, 2760, 33 L. Ed. 2d 346 (1972) (Stewart, J., concurring)").

jury right is a shield to protect the defendant from an increase in the statutory maximum for the same type of punishment, absent sufficient proof. In *Jackson*, the defendant objected to the penalty jury (because it could not help, but only hurt his lot); but under *Blakely*, the jury serves to protect the defendant from increased punishment based on facts proved only to a probation officer. And, under *Blakely*, a defendant can plead guilty to avoid the jury and its potentially more severe punishment, relief not available under the government's formulation in *Jackson*.

In the context of *Blakely*, there is no constitutional provision, statute, or rule prohibiting the jury from hearing enhancement factors contained in the indictment. Given an indictment alleging enhancement factors and a jury empaneled to try the case, the government is certainly authorized to introduce evidence in an effort to prove its allegations beyond a reasonable doubt. *See, e.g.*, *United States v. Taylor*, 17 F.3d 333 (11th Cir. 1994) (permitting government to introduce relevant evidence to prove charges in the indictment); *United States v. Scop*, 940 F.2d 1004 (7th Cir. 1991) (same); *United States v. Gonzalez*, 921 F.2d 1530 (11th Cir. 1991) (same); *United States v. Kaplan*, 886 F.2d 536, 549 (2d Cir. 1989) (same); *United States v. Finestone*, 816 F.2d 583, 587 (11th Cir. 1987) (same); *United States v. Neapolitan*, 791 F.2d 489, 501 (7th Cir. 1986) (same).

Enhancing fact evidence is comparable to many types of evidence presently admitted in federal trials, independent of *Blakely*. Evidence of intrinsic acts (sometimes denominated "*res gestae*" evidence) is admissible, because it is "inextricably intertwined with the charged offense . . . ." 2 *Weinstein on Evidence* § 404.20[2][b] (2d ed. 2004); *see, e.g.*, 18 U.S.C. § 924(c)(1)(a) (evidence of use, brandishing, or discharge of deadly or dangerous weapon or firearm is proved at trial in

relation to crime of violence or drug trafficking crime). A significant variety of extrinsic evidence is also admissible. 2 *Weinstein* § 404.20[2][c]; *see, e.g.*, *Taylor*, 17 F.3d at 338 (admission of evidence of uncharged Ecstasy in support of cocaine conspiracy); *Scop*, 940 F.2d at 1008-09 (admission of evidence of uncharged stock manipulation in securities fraud case); *Gonzalez*, 921 F.2d at 1546 (evidence of defendant's uncharged activities as a pilot admissible to prove RICO charge); Fed. R. Evid. 404(b) (evidence of other wrongs and acts admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake).

Certainly, the jury can be instructed on the law and can return verdicts with appropriate findings on those facts. Jury instructions can be readily adapted from the U.S. Sentencing Commission's *Guidelines Manual*. Adapting verdict forms to reflect the jury's appropriate findings has precedent in precisely this area. "There are classes of cases . . . where special verdicts appear to be essential if the court is to exercise its sentencing powers upon conviction." 26 *Moore's Federal Practice, Criminal Procedure* § 631.03[2] (3d ed. 2004) (citing *United States v. McNeese*, 901 F.2d 585, 605-06 (7th Cir. 1990); *United States v. Stassi*, 544 F.2d 579, 583 (2d Cir. 1976)). Such forms are especially appropriate where, under the charged conduct, there are "varying penalties," or "penalties differ," or a "single act [is] committed by alternative means" *Id.* (citing cases).

Even the current *Guidelines Manual* recognizes that special verdict forms are appropriate for a proper sentencing, at least in the case of hate crimes. In such cases, the *Manual* states, the jury must make a specific verdict finding, beyond a reasonable doubt, that the defendant selected the victim because of race, color, religion, national origin, ethnicity, gender, disability, or

sexual orientation. U.S.S.G. § 3A1.1(a) (Nov. 2003). And, at least since *Cotton*, verdict forms in federal narcotics prosecutions have required jurors to designate drug type and quantity. Otherwise, the enhanced statutory sentence range cannot be applied.

As in the case of *Blakely*-compliant indictments, real-world practice proves that *Blakely*-complaint jury trials are readily assimilated into federal criminal practice. Consider, for example, *United States v. Carlos Cardenas, et al.*, Case No. 03-20450-CR-GOLD(s) (S.D. Fla.), *available at* http://pacer.flsd.uscourts.gov (Local Option Images). This multi-defendant, multi-count, money laundering and MDMA/Ecstasy distribution conspiracy prosecution was completed less than a month after *Blakely* was decided, yet both the government and the district judge readily adapted to its requirements. The government introduced evidence to support enhancement facts, the court instructed the jury, fashioned appropriate special verdicts, and a portion of the verdict was returned in bifurcated jury deliberations. Three defendants were convicted of all counts, *id.* at docket entry ("DE") 657-59; one defendant had split verdicts, convicted on some counts and acquitted on others, *id.* at DE 660; and one defendant was acquitted of all counts, *id.* at DE 655. The guilty verdict forms required special findings, including a multiple-choice selection from many possible ranges of pill quantity, corresponding to the possibilities under U.S.S.G. § 2D1.1; the jury chose an appropriate pill quantity range on the guilty verdict forms. *Id.* at DE 657-60. The money laundering verdicts required the jury to select the means, knowledge, and intent with which the crimes were committed, as well as to choose the value of the laundered funds, from a list comparable to the Guidelines ranges; the jury again made appropriate selections. *Id.* at DE 657-59. After the initial verdicts were returned, the district court had the jury deliberate

again, this time to deliver special jury verdicts concerning the amount of funds laundered, another fact that determines guidelines sentencing. The jury deliberated and filled in by hand the amounts relating to each count: $11,340.00, $3,250.00, and $14,5990 on one verdict; $0 on the other.

The trial lasted 25 days. *Id.* at DE 661. The first jury deliberation was completed in less than two trial days, while the bifurcated second stage lasted a day. *Id.* at DE 661, 665. The only jury instructions added to satisfy *Blakely* were these two brief passages. First:

> If you find the defendant guilty of this count, you are further instructed to select the number of pills attributable to the defendant on the verdict form. The number of pills attributable to the defendant is the actual number of pills the defendant possessed.

Id. at DE 653, Inst. 13 (conspiracy to possess with intent to distribute MDMA/Ecstasy), Inst. 15 (possession with intent to distribute MDMA/Ecstasy). Second:

> In the verdict form you will be asked to specify the amount of currency involved in each count that you find the defendant guilty of violating. Obviously, if you find the defendant "not guilty" it will not be necessary for you to specify any amount.

Id. at DE 653, Inst. 17A (money laundering and conspiracy to money launder).

None of this should be surprising. Jurors in federal civil cases are called upon to decide individual liability, to determine loss or damages, and to apportion responsibility. Often, those

are complex cases. Yet, there is no surprise when jurors fulfill their duty in the civil case setting.

There may, of course, be cases in which the enhancement evidence becomes unduly prejudicial, making it difficult for jurors to render impartial verdicts. But such concerns have long been addressed in the federal courts. *See* Fed. R. Evid. 403 (authorizing court to exclude relevant evidence if unduly prejudicial). In the event that required enhancement evidence threatens to prejudice the determination of guilt or innocence, the district court and defendant have two options, stipulation to the fact (if that is appropriate) under *Old Chief v. United States*, 519 U.S. 172 (1997) (holding it an abuse of discretion under Rule 403 to disallow defendant's stipulation to prior felony convictions where such convictions are an element of the offense), or bifurcation of the trial.

A district court's authority and discretion to bifurcate a trial stem from two sources. First, Federal Rule of Evidence 611(a) gives a court the authority to control the mode and order of the presentation of evidence. *Geders v. United States*, 425 U.S. 80, 86 (1976) ("The trial judge must meet situations as they arise and to do this must have broad power to cope with the complexities and contingencies inherent in the adversary process. To this end, he may determine generally the order in which parties will adduce proof; his determination will be reviewed only for abuse of discretion."). Second, Federal Rule of Criminal Procedure 14(a) gives a court authority and discretion to control the format of a trial, providing that the Court "may order separate trials of counts . . . or provide any other relief that justice requires." *See Zafiro v. United States*, 506 U.S. 534, 538-39 (1993) (Rule 14 "leaves the tailoring of the relief to be granted [on a motion to sever], if any, to the district court's sound discretion"); *see also United States v.*

Joshua, 976 F.2d 844, 847-48 (3d Cir. 1992) (approving district court's decision to bifurcate, rather than sever, felon-in-possession count from armed bank robbery count); *United States v. Carlson*, 423 F.2d 431, 435 (9th Cir. 1970) (in reviewing district court's refusal to bifurcate one defendant's insanity defense from other defendants' general "not guilty" defense, stating that "[t]he trial court undoubtedly had authority to bifurcate the trial if it had wished to do so").

Blakely assimilates into the sentencing process as well. Admittedly, the Sentencing Commission thought that judges should make many of the findings that *Blakely* allots to juries. But nothing in the Sentencing Reform Act of 1984 required the precise federal sentencing guidelines now in effect. The choice of judicial factfinding, instead of jury factfinding, was simply a philosophical choice of the United States Sentencing Commission to adopt a "real offense" system instead of a "charge-offense" system. *See* United States Sentencing Commission, *Guidelines Manual* § 1A1.1, comment. (Chapter One – Introduction and General Application Principles) (Nov. 2003) at 4-5. The Commission chose, as a matter of policy, a preponderance of evidence standard for factual disputes because it predicted that the lesser standard "is appropriate to meet due process requirements." U.S.S.G. § 6A1.3, p.s., comment. It could have chosen jury factfinding and the reasonable doubt standard that *Blakely* now requires. To be sure, neither the Act nor the guidelines prevent the jury findings required by *Blakely*.

For those many cases in which no shift in maximum sentence can occur, the guidelines continue to operate as before. For those few cases in which a shift does occur as a result of a jury finding, the guidelines also continue to operate as before, except the jury's findings lock in the statutory maximum

sentence.[15] *Blakely*'s requirements are consistent with both the enabling legislation and the guidelines.

Similarly, nothing in Federal Rule of Criminal Procedure 32 prohibits the assimilation of *Blakely*. For those cases without possibility of an increased statutory maximum, the rule functions as before. For those cases in which the jury makes a positive finding for an indicted enhancement factor, the rule also functions as before. And for those cases in which the jury makes a negative determination, the judge is bound by that decision in setting the statutory maximum sentence, eliminating any need for a judicial determination because "the matter will not affect sentencing." Fed. R. Crim. P. 32(i)(3)(B); *see* U.S.S.G. § 5G1.1(a) (guideline range cannot exceed "statutorily authorized maximum penalty").

Only some of the 3% of sentencings that follow a trial will involve any enhancing facts[16] and only those are affected by the trial requirements of *Blakely*. For them, the government must prove its case beyond a reasonable doubt, and the jury (or judge, in a non-jury trial) must make findings about the indictment's allegations. There is nothing in the law or structure of the criminal justice system that prevents these processes.

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[15] The judge does, however, retain authority to pretermit or override the jury's verdict, based upon insufficiency of evidence, under Federal Rules of Criminal Procedure 29, 33 and 34.

[16] Many offenders do not receive upward adjustments to their base offense levels. Very few offenders – less than 1% in most categories – receive upward adjustments under Chapter Three. *Sourcebook of Federal Sentencing Statistics* (2002) (Table 18). Upward departures under Chapter Five also occur very rarely, in only 0.8% of cases. *Id.* (Figure G).

D. Rather than cause chaos, applying *Blakely* to guidelines practice enhances the accuracy, integrity, and public reputation of sentencing in federal courts.

"There is always in litigation a margin of error, representing error in factfinding . . . ." *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958). In a criminal case, "this margin of error is reduced by . . . persuading the factfinder . . . beyond a reasonable doubt." *Id.*, *cited with approval in In re Winship*, 397 U.S. 358, 364 (1970). The reasonable doubt standard "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." *Winship*, 397 U.S. at 364, *cited with approval in Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972). This state of certitude is just as valuable in the determination of punishment as it is in the determination of guilt or innocence. "The genius of our criminal law is violated when punishment is enhanced in the face of a reasonable doubt as to the facts leading to enhancement." *People v. Reese*, 179 N.E. 305, 308 (N.Y. 1932) (Cardozo, C.J.).

Blakely promotes accuracy in sentencing precisely because it requires factfinding beyond a reasonable doubt. Accuracy in factual determinations that may alter the statutory maximum sentence reduces unwarranted sentencing disparities, honoring one of the overriding objectives of Congress in adopting a guidelines system. Applied to the federal guidelines, *Blakely* ensures that defendants tried and convicted of similar crimes will receive similar sentences. In doing so, *Blakely*'s application enhances the integrity and public reputation of federal sentencing proceedings.

CONCLUSION

Based upon the arguments and citations of authority of the respondents and *amici*, it is respectfully requested that the Court apply the principles of *Blakely v. Washington* to practice under the United States Sentencing Guidelines.

Respectfully submitted,

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September 2004

FOR ARGUMENT

Nos. 04-104 & 04-105

Supreme Court, U.S.
FILED
SEP 21 2004
OFFICE OF THE CLERK

IN THE

United States Supreme Court

UNITED STATES OF AMERICA,

Petitioner,

vs.

FREDDIE J. BOOKER,

Respondent.

UNITED STATES OF AMERICA,

Petitioner,

vs.

DUCAN FANFAN,

Respondent.

On Writ of Certiorari to the United States Courts of Appeals for the First and Seventh Circuits

BRIEF OF *AMICUS CURIAE* NEW YORK COUNCIL OF DEFENSE LAWYERS IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant?

2. If the answer to the first question is "yes," the following question is presented: whether in a case in which the Guidelines would require the court to find a sentence-enhancing fact, the Sentencing Guidelines as a whole would be inapplicable, as a matter of severability analysis, such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the offense of conviction?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICUS CURIAE* NEW YORK COUNCIL OF DEFENSE LAWYERS	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
THE FEDERAL SENTENCING GUIDELINES FALL SQUARELY WITHIN THE HOLDING OF *BLAKELY* THAT DEFENDANTS CANNOT BE SUBJECT TO INCREASED PUNISHMENT BASED ON FACTS NEITHER ADMITTED BY THE DEFENDANT NOR FOUND BY A JURY BEYOND A REASONABLE DOUBT	3
A. The Federal Sentencing Guidelines Define "Statutory Maxima" For Federal Crimes For The Purposes Of *Blakely* And *Apprendi*....	4
1. The Touchstone Of The Sixth Amendment Analysis In *Blakely* Is The Preservation Of The Jury As The Fact-Finder For All Facts Relevant To Punishment; That The Federal Sentencing Guidelines Are Administratively Promulgated Is Irrelevant ...	5

	Page
2. The Washington State Sentencing Scheme At Issue In *Blakely* Is Constitutionally Indistinguishable From The Federal Sentencing Guidelines	8
a. The Federal Sentencing Guidelines Require Sentences Based On Judicial Findings Of Fact By A Preponderance Of The Evidence	9
b. For Purposes Of *Blakely*, The Federal Sentencing Guidelines And The Washington State Sentencing Scheme Are Virtually Identical	12
3. That Indeterminate Sentencing Schemes Are Constitutional Does Not Mean That The Federal Guidelines As Currently Applied Are Constitutional	14
CONCLUSION	16

TABLE OF AUTHORITIES

Page

Cases

Apprendi v. New Jersey, 530 U.S. 466 (2000) 3

Blakely v. Washington, 124 S. Ct. 2531 (2004) .... *passim*

Stinson v. United States, 508 U.S. 36 (1993) 7

United States v. Ameline, 376 F.3d 967 (9th Cir. 2004) 5

United States v. Booker, 375 F.3d 508 (7th Cir. 2004) ..... *passim*

United States v. Croxford, 324 F. Supp. 2d 1255 (D. Utah 2004) 5

United States v. Einstman, 325 F. Supp. 2d 373 (S.D.N.Y. 2004) 1, 5

United States v. Gonzalez, No. 03 CR. 41 (DAB), 2004 WL 1444872 (S.D.N.Y. June 28, 2004) ... 5

United States v. Hammoud, No. 03-4253, 2004 WL 2005622 (4th Cir. Sept. 8, 2002) 4, 5

United States v. King, 328 F. Supp. 2d 1276 (M.D. Fla. 2004) 5

United States v. Koch, No. 02-6278, 2004 WL 1899930 (6th Cir. Aug. 26, 2004) 4, 6

United States v. Leach, 325 F. Supp. 2d 557 (E.D. Pa. 2004) 5

Page

United States v. Lamoreaux, No. 03-00399-01/02-CR-W, 2004 WL 1557283 (W.D. Mo. July 7, 2004) 5

United States v. Marrero, 325 F. Supp. 2d 453 (S.D.N.Y. 2004) 2

United States v. Medas, 323 F. Supp. 2d 436 (E.D.N.Y. 2004) 5

United States v. Montgomery, 324 F. Supp. 2d 1266 (D. Utah 2004) 5

United States v. Mueffelman, 327 F. Supp. 2d. 79 (D. Mass. 2004) 5

United States v. Pineiro, 377 F.3d 464 (5th Cir. 2004) 4, 5-6

United States v. Reese, No. 03-13117, 2004 WL 1946076 (11th Cir. Sept. 2, 2004) 4, 6

United States v. Shamblin, 323 F. Supp. 2d 757 (S.D. W.Va. 2004) 5

United States v. Toro, No. 3:02CR362PCD, 2004 WL 1553602 (D. Conn. July 6, 2004) 5

United States v. Watts, 519 U.S. 148 (1997) 11

Rules and Statutes

18 U.S.C. § 3553(a) (2003) 15

18 U.S.C. § 3553(b) (2003) 13

18 U.S.C. § 3553(b)(1) (2003) 9

28 U.S.C. § 994(p) (2003) 7

	Page
Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act, Pub. L. No. 108-21, 117 Stat. 650 (2003)	7, 8
United States Sentencing Guidelines (USSG):	
§ 1B1.1	13
§ 1B1.2	13
§ 1B1.1(c)	10
§ 1B1.3(a)	10, 11
§ 2A2.2	13
§ 2B1.1	9, 13
§ 2D1.1(a)	9
§ 2D1.1(b)	9, 13
§ 2H3.1(c)	10
§ 2J1.2(b)	10, 13
§ 3C1.1	10, 11
§ 5A	12
Wash. Rev. Code Ann. § 9.94A.510 (West 1981)	12
Wash. Rev. Code Ann. § 9.94A.520 (West 1981)	13
Wash. Rev. Code Ann. § 9.94A.533(3) (West 1981)	13

INTEREST OF *AMICUS CURIAE* NEW YORK COUNCIL OF DEFENSE LAWYERS

The New York Council of Defense Lawyers ("NYCDL") is a not-for-profit professional association of approximately 200 lawyers (many of whom are former federal prosecutors) whose principal area of practice is the defense of criminal cases in the federal courts of New York.[1] As *amicus*, the NYCDL offers the Court the perspective of very experienced practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts. The NYCDL has an interest in this case in so far as it will determine, in whole or in part, whether the federal Sentencing Guidelines will continue to bind district court judges. It also has an interest in ensuring that federal criminal defendants receive the full benefit of the protections afforded by the Sixth Amendment. We believe that it is imperative to the protection of our clients' rights, and to the establishment of a more just sentencing system, that *Apprendi* be applied to enhancements under the Guidelines.

This amicus brief addresses only the first of the two questions presented. It does not address question two because, as the government effectively concedes, if the answer to question one is "yes," then under the doctrine of statutory severability Section 3553(b) of Title 18 must be struck down in its entirety. A number of courts have so held. *See, e.g., United States v. Einstman*, 325 F. Supp. 2d

[1] The parties' letters of consent to the filing of this brief are being submitted herewith. Pursuant to Supreme Court Rule 37, *amicus curiae* states that this brief has not been authored in whole or in part by counsel for a party in this case, and no entity other than the *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

373, 380 (S.D.N.Y. 2004) ("[T]he unconstitutionality of the provisions concerning the judicial fact-finding of sentencing enhancements necessarily means the entire USSG scheme falls."); *United States v. Marrero*, 325 F. Supp. 2d 453, 456-57 (S.D.N.Y. 2004) ("[I]f such sentencing enhancements are unconstitutional, the entire Sentencing Guidelines must be set aside, since the offending sections cannot meaningfully be severed from the whole.").

SUMMARY OF THE ARGUMENT

The federal Courts of Appeals are split on whether the holding of *Blakely v. Washington*, 124 S. Ct. 2531 (2004), applies to the federal Sentencing Guidelines. The Seventh and Ninth Circuits have held that the Sixth Amendment renders all judicial sentencing enhancements under the Guidelines unconstitutional, while the Fourth, Fifth, Sixth and Eleventh Circuits have concluded that *Blakely* does not compel that result. The core position taken by the government, which effectively adopts the majority opinions in the latter Circuits, is that because judicial enhancements under the Guidelines are based on agency rules, not statutes as in *Blakely*, they do not impair a defendant's jury trial rights.

This distinction without any difference evades the core constitutional principles protected by the majority in *Blakely*. The Court should not allow any effort to insulate the Guidelines from the constitutional mandates of that decision.

ARGUMENT

THE FEDERAL SENTENCING GUIDELINES FALL SQUARELY WITHIN THE HOLDING OF *BLAKELY* THAT DEFENDANTS CANNOT BE SUBJECT TO INCREASED PUNISHMENT BASED ON FACTS NEITHER ADMITTED BY THE DEFENDANT NOR FOUND BY A JURY BEYOND A REASONABLE DOUBT

In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), this Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Blakely* holds that for the purposes of *Apprendi*, "the 'statutory maximum' . . . is the maximum sentence a judge may impose *solely on the basis of facts reflected in the jury verdict or admitted by the defendant*." 124 S. Ct. at 2537. The fundamental question presented in the cases before the Court is whether the "statutory maximum" for federal criminal offenses is defined by the Guidelines or the United States Code for the purposes of *Blakely*. If it is the former, then under *Blakely* all judicial enhancements must fall.

Neither the government nor the Courts of Appeals that have declined to apply *Blakely* to the Guidelines have offered any principled reason for that result. Instead, their arguments are based on semantics and rigid adherence to inapposite precedent. The Sixth Amendment right to a jury trial is "no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Blakely*, 124 S. Ct. at

2538-39. Where such fundamental constitutional protections are at issue, form should not be elevated over substance. But that is precisely what the government would have this Court do.

A. The Federal Sentencing Guidelines Define "Statutory Maxima" For Federal Crimes For The Purposes Of *Blakely* And *Apprendi*

The government's primary basis for distinguishing *Blakely* is its argument that the "statutory maximum" sentence for purposes of *Blakely* is the sentence set by Congress in Title 18 of the United States Code, rather than the sentence required by section 3553(b) and application of the Guidelines. *See* Brief for Petitioner United States ("Pet'r Br.") at 14, 20 (stating that the Guidelines do not establish statutory maxima). The Fourth, Fifth, Sixth and Eleventh Circuits as well as Judge Easterbrook's dissent in *Booker* all adopted this theory in their opinions. *See United States v. Hammoud*, No. 03-4253, 2004 WL 2005622, at **25-28 (4th Cir. Sept. 8, 2002) (*en banc*); *United States v. Pineiro*, 377 F.3d 464, 473 (5th Cir. 2004); *United States v. Koch*, No. 02-6278, 2004 WL 1899930, at *5 (6th Cir. Aug. 26, 2004) (*en banc*); *United States v. Reese*, No. 03-13117, 2004 WL 1946076, at *4 (11th Cir. Sept. 2, 2004); *United States v. Booker*, 375 F.3d 508, 518-21 (7th Cir. 2004) (Easterbrook, J., dissenting). This argument rests on three faulty premises: (1) because the Guidelines are regulations promulgated by the Sentencing Commission, rather than statutes enacted by Congress, the Sixth Amendment analysis in *Blakely* does not apply; (2) there are constitutionally significant differences between the Washington scheme and the Guidelines; and (3) the Guidelines do

nothing more than what judges historically did under indeterminate sentencing schemes and therefore, because indeterminate schemes are constitutional, the Guidelines are constitutional.

1. The Touchstone Of The Sixth Amendment Analysis In *Blakely* Is The Preservation Of The Jury As The Fact-Finder For All Facts Relevant To Punishment; That The Federal Sentencing Guidelines Are Administratively Promulgated Is Irrelevant

Judge Easterbrook, in dissent in *Booker*, was the first to opine that *Blakely* does not apply to the Guidelines because, unlike the Washington enhancements at issue in *Blakely* that are prescribed by statute, the Guidelines are neither statutes nor their functional equivalent. Two Circuits and numerous district courts have rejected that reasoning. *See Booker*, 375 F.3d at 511; *United States v. Ameline*, 376 F.3d 967, 974 (9th Cir. 2004).[2] However, four Circuits have accepted it, and the government argues it here. *Hammoud*, 2004 WL 2005622, at **25-28; *Pineiro*,

[2] *See also, e.g., United States v. Mueffelman*, 327 F. Supp. 2d 79 (D. Mass. 2004); *United States v. King*, 328 F. Supp. 2d 1276 (M.D. Fla. 2004); *United States v. Einstman*, 325 F. Supp. 2d 373 (S.D.N.Y. 2004); *United States v. Leach*, 325 F. Supp. 2d 557 (E.D. Pa. 2004); *United States v. Croxford*, 324 F. Supp. 2d 1255, 1256-58 (D. Utah 2004); *United States v. Montgomery*, 324 F. Supp. 2d 1266, 1267-68, 1271 (D. Utah 2004); *United States v. Lamoreaux*, No. 03-00399-01/02-CR-W, 2004 WL 1557283, at *1 (W.D. Mo. July 7, 2004); *United States v. Toro*, No. 3:02CR362PCD, 2004 WL 1553602 (D. Conn. July 6, 2004); *United States v. Medas*, 323 F. Supp. 2d 436, 436 (E.D.N.Y. 2004); *United States v. Shamblin*, 323 F. Supp. 2d 757, 766-67 (S.D. W.Va. 2004); *United States v. Gonzalez*, No. 03 CR. 41 (DAB), 2004 WL 1444872, at *2 (S.D.N.Y. June 28, 2004).

377 F.3d at 470; *Koch*, 2004 WL 1899930, at *5; *Reese*, 2004 WL 1946076, at *2; Pet'r Br. at 14, 20. Under this theory, the maxima and minima defined in Title 18 are the *Apprendi*-relevant maxima, and the Guidelines are merely rules through which "judges and executive officials . . . take part in determining how much of the statutory maximum the defendant serves in prison." *Booker*, 375 F.3d at 520 (Easterbrook, J., dissenting); *see also id.* at 519 ("*Booker* has been convicted of 'cocaine distribution in the first degree' and the jury's verdict authorizes life imprisonment. What happens after that is unrelated to the sixth amendment.") (Easterbrook, J., dissenting). By focusing on purported distinctions between statutes and rules for the purposes of the Sixth Amendment, Judge Easterbrook and the relevant Circuit Courts miss the point of *Blakely*.

Nothing in any of the *Blakely* opinions suggests that the Court's holding or any of its reasoning was based on the fact that the enhancement permitted by the Washington sentencing scheme was in the form of a statute rather than an agency's authorized rules. The Court's holding is based exclusively on the Sixth Amendment principle that "a judge's authority to sentence [must] derive[ ] wholly from the jury's verdict." *Blakely*, 124 S. Ct. at 2539. As Judge Posner correctly emphasized, in promulgating the Guidelines, the "[Sentencing] Commission is exercising power delegated to it by Congress, and if a legislature cannot evade what the Supreme Court deems the commands of the Constitution . . . , neither, it seems plain, can a regulatory agency." *Booker*, 375 F.3d. at 511. Whether a sentencing enhancement is based on a statute or a binding rule delegated by a legislature is entirely irrelevant to the Sixth Amendment right at issue in these cases.

Even if this distinction were valid, ultimately it is a statute (and not the Guidelines themselves) that mandates application of the Guidelines. Section 3553(b) of Title 18, passed as part of the Sentencing Reform Act of 1984 (the "Act" or the "Reform Act"), requires the court to impose a sentence within the standard guidelines range unless the court finds that there exist circumstances in the case not adequately considered in establishing the sentencing range. In that event—and only in that event—the statute permits a higher sentence. Accordingly, that the Guidelines themselves were promulgated by an agency exercising delegated authority is a red herring. Congress itself has made the Guidelines "binding on federal courts," *Stinson v. United States*, 508 U.S. 36, 42 (1993), and the Reform Act "*require[s]* the sentencing judge to make findings of fact." *Booker*, 375 F.3d at 511. Moreover, the Sentencing Commission's proposed guidelines must be submitted to Congress and do not take effect for a period of 180 days, during which Congress may modify or reject them. 28 U.S.C. § 994(p) (2003). As the government's brief acknowledges, even after the Guidelines take effect, Congress can revoke or amend them at any time. Pet'r Br. at 24-25. It has exercised these powers, rejecting proposed guidelines and directing the Commission to review and amend the Guidelines. *See id.* Finally, of course, Congress has enacted Guidelines itself, most recently last year in the PROTECT Act. *See* Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act, Pub. L. No. 108-21, 117 Stat. 668-69, 671-73 (2003).

2. The Washington State Sentencing Scheme At Issue In *Blakely* Is Constitutionally Indistinguishable From The Federal Sentencing Guidelines

The government also argues that there are constitutionally significant differences between the Washington state system and the federal Sentencing Guidelines beyond the regulation versus statute distinction. This argument elevates form over substance. At bottom, the schemes are *substantively* indistinguishable for purposes of constitutional analysis. Both the Washington state and federal schemes require judges to impose higher sentences based on facts that were neither admitted by the defendant nor found by a jury beyond a reasonable doubt—the fundamental Sixth Amendment concern in *Blakely*.

Moreover, from the perspective of the defendant whose rights are at stake it does not matter whether the source of a rule is a legislature or an administrative body exercising legislative authority, or even whether the legislature has placed that administrative body formally in the judiciary branch.[3] What matters is whether the defendant will be able to make arguments for a particular sentence based on a range of factors including the offense and characteristics of the offender or whether the court will be bound to make a sentencing determination based on facts not found by the jury.

[3] Indeed, it is questionable whether the Sentencing Commission can still be treated as part of the judiciary. In 2003 Congress eliminated the requirement that federal judges sit on the Commission. *See* Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act, Pub. L. No. 108-21, 117 Stat. 650, 676 (2003).

a. The Federal Sentencing Guidelines Require Sentences Based On Judicial Findings Of Fact By A Preponderance Of The Evidence

The Act requires federal courts to impose a sentence in accordance with the Sentencing Guidelines unless "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b)(1). The Guidelines permit a court to start with the facts admitted by the defendant or found by the jury in determining the base offense level. For certain offenses, however, the Guidelines provide more than one possible base offense level and direct judges to choose among them based on specific conduct found by the judge by a preponderance of the evidence.[4]

The judge must increase the offense level for certain crimes on the basis of "Specific Offense Characteristics."[5] Sentencing judges must also apply "Cross References" that may drastically increase the base offense level for a crime

[4] *See, e.g.*, USSG § 2D1.1(a) (describing base offenses for drug crimes, which in many cases may vary with the type and quantity of drugs involved in the offense); *see also id.*, Commentary Application Note 12 ("Types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level. . . .").

[5] *See, e.g.*, USSG § 2D1.1(b) (increasing offense level for possession of firearms, importing or exporting of controlled substances, distributing drugs in prison, and the importation or manufacture of methamphetamine), § 2B1.1 (increasing offense level for fraud, theft and other property offenses based upon amount of money lost), and § 2J1.2(b) (increasing base offense level for various circumstances involved in obstruction of justice offenses).

on the basis of a judicially determined fact such as the existence of a specific motive.[6] Further, the Guidelines may require the judge to raise the base offense level on the basis of findings "related to victim, role, and obstruction of justice."[7] All increases in sentence above the base offense level are made by the sentencing judge's findings of fact by a preponderance of the evidence.

The "Relevant Conduct" provisions in the Guidelines also violate *Blakely*'s holding that the Sixth Amendment protects defendants from having a court usurp the jury's role as fact finder and ensures defendants' rights to a beyond a reasonable doubt standard. The Guidelines require that defendants' sentences be increased based on conduct judges deem criminal by a preponderance of the evidence, even though it was not charged in the indictment or the defendant was acquitted of such conduct. Under Section 1B1.3(a) a court must consider all "Relevant Conduct" when sentencing a defendant. USSG § 1B1.3(a). "Relevant conduct" includes all acts by the defendant (and, in the case of charged or uncharged "jointly undertaken criminal activity", all "reasonably foreseeable acts and omissions of others in furtherance of" such activity) that a judge finds to have occurred "during . . . , in preparation for . . . , or in the course of attempting to avoid detection or responsibility for" the offense of conviction.

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[6] *See, e.g.*, USSG § 2H3.1(c) (raising base offense level for eavesdropping offense to that for another crime if defendant's motive involved intent to commit the latter crime).

[7] USSG § 1B1.1(c), detailed in Chapter Three of the Guidelines, which need not be incorporated in the offense of conviction and may be made by a judge. *See, e.g.*, USSG § 3C1.1 (Obstructing or Impeding the Administration of Justice); *id.* Commentary Application Note 1.

USSG § 1B1.3(a); *id.* Commentary Background ("Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range."). Thus, even where a jury has acquitted a defendant of a crime, a sentencing judge must impose a sentence as if the defendant was convicted of that crime if the court finds that conduct to be "relevant conduct." *United States v. Watts*, 519 U.S. 148 (1997). Similarly, under Section 3C1.1, a court is required to enhance a defendant's sentence where *it* finds by a preponderance of the evidence that the defendant committed perjury or more generally obstructed justice during the course of the trial. USSG § 3C1.1. Even though the predicate acts for an obstruction enhancement, such as perjury, are themselves crimes, under the Guidelines they need not be found by a jury beyond a reasonable doubt when considered in the context of sentencing. The Court suggested that this type of enhancement was unconstitutional in *Blakely* itself. *See Blakely*, 124 S. Ct. at 2540 n.11 ("Why perjury during trial should be grounds for a judicial sentence enhancement on the underlying offense, rather than an entirely separate offense to be found by a jury beyond a reasonable doubt (as it has been for centuries . . .), is unclear.").

Thus, in many circumstances, the Guidelines direct a court to enhance or upwardly adjust a defendant's sentence based upon its own substantive fact-findings, regardless of whether those facts were charged in the indictment or submitted to the jury (or even if the jury rejected the findings). In that regard, they are contrary to the Sixth Amendment.

b. For Purposes Of *Blakely*, The Federal Sentencing Guidelines And The Washington State Sentencing Scheme Are Virtually Identical

The government claims that the Washington scheme and the federal Sentencing Guidelines are constitutionally distinct. It points out that the state system at issue in *Blakely* sets different *statutory* penalties for the basic offense and aggravated versions of the offense (*e.g.*, kidnapping, kidnapping with a firearm, and kidnapping with a firearm and deliberate cruelty). Pet'r Br. at 27. According to the government, unlike the Washington scheme, under the Guidelines "multiple factors . . . influence the sentence imposed under a single statutory maximum." *Id.* at 29. This is a distinction without a difference. As demonstrated above, that the state sentences are imposed pursuant to statute rather than regulation is irrelevant for purposes of *Blakely*. Moreover, that the Sentencing Guidelines require *more* judicial fact finding than the state system makes the Guidelines more vulnerable to constitutional attack, not less. Finally, and perhaps most importantly, the two schemes serve the same purpose in virtually the same manner and therefore are constitutionally indistinguishable.

Both the Washington state sentencing scheme and the Guidelines begin with a base level offense (the "standard range" in the state system) and then permit adjustments or departures based on judicial fact-finding. Both systems calculate a binding sentencing range by reference to the defendant's criminal history and the offense of conviction. *Compare* Wash. Rev. Code Ann. § 9.94A.510 (West 1981) (table) (giving relevant axes as "Seriousness Level" and "Offender Score") *with* USSG § 5A (Sentencing Table)

(giving relevant axes as "Offense Level" and "Criminal History Category"); USSG §§1B1.1-.2 (calculating Offense Level by reference to offense of conviction); Wash. Rev. Code Ann. § 9.94A.520 (West 1981) ("The offense seriousness level is determined by the offense of conviction.").

Both systems permit the judge to impose a sentence above the "standard range" based upon certain judicial findings by a preponderance of the evidence. Under the Washington system, a judge must add as many as five years to the standard sentencing range if the defendant is convicted of a felony eligible for a firearm enhancement and the judge finds that the defendant possessed a firearm during the commission of the felony. Wash. Rev. Code Ann. § 9.94A.533(3) (West 1981). Under the Sentencing Reform Act, a judge may also add many years to a sentence if, but only if, the court (and the court alone) finds the existence of an aggravating circumstance. 18 U.S.C. § 3553(b).

Likewise, the federal Sentencing Guidelines instruct a judge to increase the "Offense Level" if she finds certain "specific offense characteristics," such as the fact that a defendant brandished or discharged a firearm. *See, e.g.*, USSG § 2A2.2 (adding 3 points to base offense level for aggravated assault if defendant brandished a firearm); USSG § 2D1.1(b) (increasing offense level for possession of firearms, importing or exporting of controlled substances, distributing drugs in prison, and the importation or manufacture of methamphetamine); § 2B1.1 (increasing offense level for fraud, theft and other property offenses based upon amount of money lost); § 2J1.2(b) (increasing base offense level for various circumstances involved in obstruction of justice offenses).

In sum, under both the Washington statute and the Reform Act a court is permitted to impose a longer sentence based on facts it finds by a preponderance of the evidence. This was the fundamental concern underlying the Court's decision in *Blakely*. It is also the reason why the federal Sentencing Guidelines violate *Blakely*.

3. That Indeterminate Sentencing Schemes Are Constitutional Does Not Mean That The Federal Guidelines As Currently Applied Are Constitutional

The government also argues that *Blakely* does not apply to the Federal Sentencing Guidelines because the Sentencing Commission does nothing more than what sentencing judges historically did under the old indeterminate scheme. Pet'r Br. at 22. This argument misses the mark. As set forth above, and as practitioners experience every day in court, the Guidelines do far more than what sentencing judges did under the indeterminate system. The Guidelines are a legislatively mandated set of rules that are binding by federal statute and that specify which facts courts may consider and what the sentencing consequences of those facts will be. As a result, in certain circumstances, unless and until a court finds specific facts by a preponderance of the evidence, a defendant cannot be subject to a higher sentence than that specified in the Guidelines. As Judge Posner emphasized in *Booker*: "[T]here is a difference between allowing a sentencing judge to consider a range of factors that may include facts that he informally finds [as occurred under the indeterminate system] . . . and commanding him to make fact findings and base the sentence (within a narrow band) on them." 375 F.3d at 512. That difference of course, is "whether the defendant has a legal

right to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned." *Blakely*, 124 S. Ct. at 2540.[8]

As this Court made clear in *Blakely*, determinate schemes may be constitutional, so long as they are implemented in a way that respects the Sixth Amendment. 124 S. Ct. at 2540. The state determinate scheme in *Blakely* did not meet that minimum constitutional requirement. The federal determinate system cannot be held to a lesser standard.[9]

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[8] That the Guidelines allow for appellate review of sentences further underscores the point because, under the former indeterminate sentencing regime, there was no legal basis for appealing a sentence at or below the statutory maximum.

[9] Moreover, a decision that Section 3553(b) of the Sentencing Reform Act is unconstitutional and that therefore the guidelines may not be applied in a binding manner would not necessarily jeopardize the other reforms made by the Sentencing Reform Act, including the establishment of the Sentencing Commission itself and the requirement that the sentencing judge consider the guidelines in passing sentence. 18 U.S.C. § 3553(a).

CONCLUSION

Amicus respectfully submits that the rationale and holding of *Blakely* apply to the United States Sentencing Guidelines. Any sentence imposed under Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant therefore violates the Sixth Amendment.

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September 21, 2004

Supreme Court, U.S.
FILED
SEP 1 - 2004
OFFICE OF THE CLERK

(5) (5)

NOS. 04-104, 04-105

In The Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

FREDDIE J. BOOKER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Petitioner,

v.

DUCAN FANFAN,
Respondent.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF *AMICUS CURIAE* THE UNITED STATES SENTENCING COMMISSION IN SUPPORT OF PETITIONER, UNITED STATES OF AMERICA

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TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

INTRODUCTORY STATEMENT 1

A. Historical Inequities In Sentencing Prompted Passage Of The Act Establishing The Federal Sentencing Guidelines 2

B. The Act And The Guidelines Sought To Channel Courts' Traditional Discretion To Impose Sentences Within The Prescribed Statutory Maximum 3

(i) Congress Placed The Commission Within The Judicial Branch So That The Judiciary Would Retain Its Traditional Sentencing Function 4

(ii) The Act Directed The Commission To Establish Guidelines Consistent With The Maximum Sentences Fixed By Law 5

SUMMARY OF THE ARGUMENT 10

ARGUMENT 11

I. CRITICAL DIFFERENCES BETWEEN THE NATURE OF THE GUIDELINES AND THE WASHINGTON STATUTORY SCHEME DEMONSTRATE THAT THE IMPOSITION OF A GUIDELINE SENTENCE DOES NOT VIOLATE THE SIXTH AMENDMENT 11

A. The Guidelines Assign Weights To Traditional Sentencing Factors Within Statutory Constraints 12

B. The Guidelines Cabin Judicial Discretion Within Statutory Limitations 15

C. The Washington State Legislature Devised And Maintained The Sentencing System At Issue In *Blakely* 16

II. THE STATUTORY PENALTY SET BY CONGRESS FOR A FEDERAL CRIME, AND NOT THE SENTENCING GUIDELINE RANGE, ESTABLISHES THE PRESCRIBED STATUTORY MAXIMUM FOR SIXTH AMENDMENT PURPOSES 19

A. The Guidelines Do Not Establish The Statutory Maximum Penalty For Any Criminal Offense 19

B. The Court Has Recognized That The Guidelines Do Not Establish The "Statutory Maximum" For Any Criminal Offense 21

C. Considerable Precedent Supports The View That Factfinding Under The Guidelines Does Not Violate The Sixth Amendment Because The Guidelines Do Not Set Statutory Maxima 25

III. CONCLUSION 28

TABLE OF AUTHORITIES

Cases:

Apprendi v. New Jersey, 530 U.S. 466 (2000) 11, 19, 27, 28

Blakely v. Washington, 124 S. Ct. 2531 (2004) 2, 10, 11, 12, 14, 15, 16, 18, 19, 21, 22, 28

Braxton v. United States, 500 U.S. 344 (1991) 9

Chapman v. United States, 500 U.S. 453 (1991) 24

Edwards v. United States, 523 U.S. 511 (1998) 26, 27

Harris v. United States, 536 U.S. 545 (2002) 27, 28

Jones v. United States, 526 U.S. 227 (1999) 28

McMillan v. Pennsylvania, 477 U.S. 79 (1986) 28

Mistretta v. United States, 488 U.S. 361 (1989) 1, 6, 9, 21, 22

Neal v. United States, 516 U.S. 284 (1996) 23, 24

State v. Ammons, 713 P.2d 719 (Wash. 1986) 16

State v. Freitag, 896 P.2d 1254 (Wash. 1995) 16

Stinson v. United States, 508 U.S. 36 (1993) 22

United States v. Booker, 375 F.3d 508 (7th Cir. 2004) 19

United States v. Donelson, 695 F.2d 583 (D.C. Cir. 1982) 26

United States v. Dunnigan, 507 U.S. 87 (1993) 26

United States v. Grayson, 4378 U.S. 41 (1978) 3

United States v. LaBonte, 520 U.S. 751 (1997) 24, 25

United States v. Melendez, 518 U.S. 120 (1996) 25

United States v. Watts, 519 U.S. 148 (1997) 26

Witte v. United States, 515 U.S. 389 (1995) 26

Constitution, Statutes and Rules:

U.S. Const. amend. V 27, 28

U.S. Const. amend. VI 1, 10, 11, 19, 25, 27, 28

5 U.S.C. § 553 22

18 U.S.C. § 924 20

18 U.S.C. § 1003 16

18 U.S.C. § 1028 21

18 U.S.C. § 1029 21

18 U.S.C. § 1344 16

18 U.S.C. § 3553 ..... 4, 5, 21, 25

18 U.S.C. § 3624 4

18 U.S.C. § 3661 15

18 U.S.C. § 3742 4

21 U.S.C. § 841 26

21 U.S.C. § 846 26

28 U.S.C. § 991 ..... 1, 4, 5, 6

28 U.S.C. § 994 ..... 1, 4, 6, 7, 8, 10, 15, 20, 24

28 U.S.C. § 995 4

28 U.S.C. § 2074 10

Identity Theft and Assumption Deterrence Act of 1998, Pub. L. 105-318, § 4, 112 Stat. 3009 (1998) 21

Protect Act, Pub. L. 108-21, 117 Stat. 650 (2003) 5

Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (2002) 20

Wash. Rev. Code Ann. § 9.94A.120 (West 2003) 18

Wash. Rev. Code Ann. § 9.94A.320 (West 2003) 18

Wash. Rev. Code Ann. § 9.94A.505 (West 2003) 17

Wash. Rev. Code Ann. § 9.94A.510 (West 2003) 17

Wash. Rev. Code Ann. § 9.94A.515 (West 2003) 17

Wash. Rev. Code Ann. § 9.94A.520 (West 2003) 17

Wash. Rev. Code Ann. § 9.94A.530 (West 2003) 17, 18

Wash. Rev. Code Ann. § 9.94A.535 (West 2003) 17

Wash. Rev. Code Ann. § 9.94A.850 (West 2003) 12, 16

Wireless Telephone Protection Act, Pub. L. 105-172, § 2(e), 112 Stat. 55 (1998) 21

S. Ct. R. 37.6 1

Fed. R. Crim. P. 11 ..... 22, 23

United States Sentencing Commission, *Guidelines Manual*, § 1A1.1 (2003) 12, 14, 15

United States Sentencing Commission, *Guidelines Manual*, § 2B1.1 (2003) 16

United States Sentencing Commission, *Guidelines Manual*, § 3C1.1 (2003) 26

United States Sentencing Commission, *Guidelines Manual*, Ch. 4 (2003) 7

United States Sentencing Commission, *Guidelines Manual*, § 4B1.2 (2003) 22

United States Sentencing Commission, *Guidelines Manual*, § 5C1.2 (2003) 21

United States Sentencing Commission, *Guidelines Manual*, § 5G1.1 (2003) 15

United States Sentencing Commission, *Guidelines Manual*, § 5K1.1 (2003) 25

United States Sentencing Commission, *Guidelines Manual*, App. A (1987) ..... '3

United States Sentencing Commission, *Guidelines Manual*, App. A (2003) 13

United States Sentencing Commission, *Guidelines Manual*, App. C (1995).....24

United States Sentencing Commission, *Guidelines Manual*, App. C (2003).....10, 20

Other Authorities:

H.R. Rep. No. 98–1017 (1984).....2

S. Rep. 98–225 (1984).....3, 4, 6, 7, 20

S. Rep. No. 97–307 (1981).....2

Edwards Brief for Petitioners, 1997 WL 793079 (Dec. 17, 1997).....27

United States Sentencing Commission, *2002 Annual Report*.....9

United States Sentencing Commission, *Fifteen Years of Guideline Sentencing* (forthcoming Fall, 2004).....9

United States Sentencing Commission, *Preliminary Report to the Congress: Statutory Penalties Project Description and Compilations of Federal Criminal Offenses* (1989).....13

United States Sentencing Commission, *Supplementary Report on Initial Sentencing Guidelines and Policy Statements* (1987).....13, 14

United States Sentencing Commission, *Report to the Congress: Statutory Penalty Review Project* (1991).....13

United States Sentencing Commission, *The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining, Vol. 1 (December 1991)*.....2, 3

David Boerner & Roxanne Lieb, *Sentencing Reform in the Other Washington*, 28 Crime and Justice 71, 88 (M. Tonry, ed. 2001).....17

David Boerner, *The Role of the Legislature in Guideline Sentencing in the Other Washington*, 28 Wake Forest L. Rev. 381 (1993).....12, 16, 17

Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 8 (1988).....9

William W. Wilkins, Jr. & John R. Steer, *The Role of Sentencing Guidelines Amendments in Reducing Unwarranted Sentencing Disparity*, 50 Wash. & Lee L. Rev. 63, 65 (1993).....9

INTEREST OF AMICUS CURIAE

The United States Sentencing Commission (the "Commission") is an "independent commission in the judicial branch of the United States" with the power to issue, review and revise sentencing guidelines in order to standardize the sentencing decisions of the federal courts within the prescribed statutory maximum sentence set by Congress. 28 U.S.C. §§ 991(a), 994(b)(1). Promulgation of the United States Sentencing Guidelines (the "Guidelines") represents the Commission's principal work. Accordingly, the Commission has a direct interest in the constitutionality of sentences issued under those Guidelines. For this reason, the Commission also appeared before the Court as amicus curiae in *Mistretta v. United States*, 488 U.S. 361 (1989), this Court's decision upholding the constitutionality of the Guidelines. The parties have consented to the Commission's submission of this brief.[1]

INTRODUCTORY STATEMENT

The central question before the Court is whether the imposition of a Guidelines sentence based on a determination of fact that is neither found by a jury nor admitted by a defendant violates the Sixth Amendment to the United States Constitution. The answer to this question is categorically no. As this Court has recognized repeatedly,

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, the Commission states that no counsel for any other party authored any part of this brief, and no person or entity, other than the Commission and its counsel, made a monetary contribution to the preparation or submission of this brief.

the Guidelines do not establish the prescribed statutory maximum for any criminal offense. Rather, unlike the sentencing system at issue in *Blakely v. Washington*, 124 S.Ct. 2531 (2004), the Guidelines serve only to cabin judicial discretion within the statutory parameters that Congress has established for federal crimes. Accordingly, this Court has consistently upheld the constitutionality of the Guidelines, and should continue to do so in the context of the instant case.

A. Historical Inequities In Sentencing Prompted Passage Of The Act Establishing The Federal Sentencing Guidelines

In 1984, Congress enacted the Sentencing Reform Act (the "Act") in response to an emerging consensus that the Federal sentencing system was seriously broken and in need of major repair. *See* S. Rep. No. 97–307, at 956 (1981) ("glaring disparities . . . can be traced directly to the unfettered discretion the law confers on those judges and parole authorities [that implement] the sentence"). The primary problem that Congress sought to address was the grave inequity in sentencing attributable to the unfettered discretion that courts traditionally exercised in the context of an indeterminate sentencing system. *See* H.R. Rep. No. 98–1017, at 34 (1984) ("The absence of Congressional guidance to the judiciary has all but guaranteed that . . . similarly situated offenders . . . will receive different sentences").

Indeed, for more than a century, Congress afforded judges virtually unlimited authority to fashion appropriate sentences within broad statutorily prescribed ranges. *See* Commission, *The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining*, Vol. I

(December 1991) [hereinafter Commission, *1991 Report*] at 9. During that time, judges "decided the various goals of sentencing, the relevant aggravating and mitigating circumstances, and the way in which these factors would be combined in determining a specific sentence." Commission, *1991 Report*, at 9. Because each judge was "left to apply his own notions of the purposes of sentencing," the result was "an unjustifiably wide range of sentences to offenders . . . convicted of similar crimes." S. Rep. 98–225, at 38 (1984). The parole system, which applied to only a portion of those sentenced and which permitted the release of prisoners based upon inconsistent ideas regarding the potential for rehabilitation, exacerbated this lack of uniformity. Commission, *1991 Report*, at 9 (citing *United States v. Grayson*, 438 U.S. 41, 46 (1978)).

B. The Act And The Guidelines Sought To Channel Courts' Traditional Discretion To Impose Sentences Within The Prescribed Statutory Maximum

With its enactment of the Act, Congress intended to revise the federal sentencing process in a manner that would eliminate the unwarranted disparities and lack of uniformity in sentencing. As an initial matter, the Act explicitly established the only permissible goals of federal sentencing.[2] The Act also created the Commission, an agency dedicated

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[2] Congress decided that sentencing should be tailored "(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care or other correctional treatment in the most effective manner." *See* 18 U.S.C. § 3553(a)(2).

to establishing sentencing policies and practices; placed it within the Judicial Branch; and directed it to promulgate guidelines to be used for sentencing within the prescribed statutory maximum.[3] Finally, the Act authorized limited appellate review of a guideline sentence, *see* 18 U.S.C. § 3742(a), (b) (permitting a defendant to appeal a sentence above the defined range and the government to appeal a sentence falling below that range), and abolished federal parole, *see* 18 U.S.C. § 3624(a), (b). In so doing, Congress effectively consolidated in the Commission the power previously exercised by individual sentencing judges and the Parole Commission. *See* 28 U.S.C. §§ 991, 994, 995(a)(1).

(i) Congress Placed The Commission Within The Judicial Branch So That The Judiciary Would Retain Its Traditional Sentencing Function

Because Congress concluded that "sentencing should remain primarily a judicial function," S. Rep. No. 98–225, at 159, it established the Commission "as an independent commission in the judicial branch of the United States," 28 U.S.C. § 991 (a). The Act provides that the Commission is to be comprised of seven voting members (including the Chair) appointed by the President "by and with the advice

[3] Significantly, although Congress ordered the courts to follow the guidelines that the Commission was authorized to promulgate, the Act preserved judges' discretion to depart from a prescribed guideline in a particular case if the judge found an important aggravating or mitigating factor present that the Commission did not adequately consider when formulating the Guidelines. *See* 18 U.S.C. § 3553(a), (b). The Act also required courts to state their reasons for the sentences imposed and to articulate "the specific reason" for imposing sentences different from those described in a particular guideline. *See* 18 U.S.C. § 3553(c).

and consent of the Senate." *See* 28 U.S.C. § 991. Moreover, the Act establishes that "three of the [Commission's] members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States,"[4] and that no more than four members of the Commission can be members of the same political party. *Id.* (The Attorney General, or his designee, and the Chair of the Parole Commission are designated as *ex officio*, non-voting members.) Thus, the composition of the Commission itself, as designated in the Act, reinforces Congress' intent that sentencing remain a distinctly judicial undertaking.

(ii) The Act Directed The Commission To Establish Guidelines Consistent With The Maximum Sentences Fixed By Law

In the Act, Congress directed the Commission to create the Guidelines with three goals in mind. First, the Commission was to "assure the meeting of the purposes of sentencing," as set forth in 18 U.S.C. § 3553(a)(2). *See* 28 U.S.C. § 991(b)(1)(A). Second, the Commission was to "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into

[4] Although "at least three" commissioners were to be federal judges in the Act as it was originally enacted, the Prosecutorial Remedies and Other Tools To End The Exploitation of Children Today (PROTECT) Act of 2003 amended 28 U.S.C. § 991(1) to limit to "no more than three" the number of judges who may be members of the Commission. *Protect Act*, Pub. L. 108–21, 117 Stat. 650 (2003) (codified at 28 U.S.C. § 991(a)).

account in the establishment of general sentencing practices." *See* 28 U.S.C. § 991(b)(1)(B). Finally, Congress directed the Commission to "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." *See* 28 U.S.C. § 991 (b)(1)(C).

To meet these goals, Congress directed the Commission to develop sentencing ranges applicable for specific categories of offenses involving similarly situated defendants. The guidelines were not intended to trump statutory requirements. In fact, Congress required sentencing ranges to be consistent with all pertinent provisions of title 18, United State Code, and *"not include sentences in excess of the statutory maxima."* *Mistretta,* 488 U.S. at 375 (emphasis added); *see also* 28 U.S.C. § 994(b)(1). Congress placed other limitations on the guidelines as well. Congress directed that, "for sentences of imprisonment, 'the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.'" *Mistretta,* 488 U.S. at 375 (quoting 28 U.S.C. § 994(b)(2)).

In establishing a guidelines sentencing system, Congress fully expected "there [would] be numerous guideline ranges, each range describing a somewhat different combination of offender characteristics and offense circumstances," including "several guideline ranges for a single offense varying on the basis of aggravating and mitigating circumstances." S. Rep. No. 98–225, at 168. Congress intended that there "be a complete set of guidelines that covers in one way or another all important variations that commonly may be expected in criminal cases, and that

reliably breaks cases into their relevant components and assures consistent and fair results." *Id.*

Congress further directed the Commission to consider seven factors, all of which were traditionally considered in sentencing, in its formulation of offense categories: 1) the grade of the offense; 2) the aggravating and mitigating circumstances of the crime; 3) the nature and degree of the harm caused by the crime; 4) the community view of the gravity of the offense; 5) the public concern generated by the crime; 6) the deterrent effect that a particular sentence may have on others; and 7) the current incidence of the offense. *See* 28 U.S.C. § 994(c)(1)-(7). Congress also listed eleven additional factors for the Commission to consider in establishing categories of defendants. *See* 28 U.S.C. § 994(d)(1)-(11).[5] Congress further prohibited the Commission from considering the "race, sex, national origin, creed, and socioeconomic status of offenders," *see* 28 U.S.C. § 994(d), and instructed that the guidelines should reflect the "general inappropriateness" of considering certain other factors that might serve as proxies

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[5] Again, the legislative history provides additional guidance for the Commission's consideration of these statutory factors. For example, Congress intended that the "criminal history . . . factor[s] include[] not only the number of prior criminal acts – whether or not they resulted in convictions – the defendant has engaged in, but their seriousness, their recentness or remoteness, and their indication whether the defendant is a 'career criminal' or a manager of a criminal enterprise." S. Rep. No. 98–225, at 174. The promulgated guidelines include these and other criminal history measures that necessarily may require judicial factfinding extending beyond the ascertainment of the fact of prior convictions. *See* Commission, *Guidelines Manual, Ch. 4 (2003)* (all Commission Guidelines Manuals are hereinafter referred to as *"Guidelines Manual"*).

for forbidden factors, such as current unemployment. *See* 28 U.S.C. § 994(e).

In addition to these constraints, Congress provided for additional considerations for the Commission to adhere to when fulfilling its duties. Congress directed that guidelines require a term of confinement at or near the statutory maximum for certain crimes of violence and for drug offenses, particularly when committed by recidivists. *See* 28 U.S.C. § 994(h). Congress further directed the Commission to assure a substantial term of imprisonment for an offense constituting a third felony conviction, for a career felon, for one convicted of a managerial role in a racketeering enterprise, for a crime of violence by an offender on release from a prior felony conviction, and for an offense involving a substantial quantity of narcotics. *See* 28 U.S.C. § 994(i). Congress also enumerated various aggravating and mitigating circumstances to be reflected in the guidelines, such as multiple offenses or substantial assistance to the Government (respectively). *See* 28 U.S.C. § 994(l) and (n).

The Commission has additional duties, that include making recommendations to Congress regarding whether the grades or maximum penalties of offenses should be modified. *See* 28 U.S.C. § 994(r). In fulfilling these duties, the Commission was tasked to "consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system." *See* 28 U.S.C. § 994(o). It must also review and revise the Guidelines in consideration of comments and data coming to its attention. *Id.* The Commission must report to Congress any amendments to the guidelines, and must submit to Congress annually an analysis of the operation of the guidelines. *See* 28 U.S.C. § 994(p),(w).

Recognizing that the Guidelines should conform to the needs of the system, the Commission expected that its work on the Guidelines would be evolutionary. *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 8 (1988). The Commission would therefore "issu[e] Guidelines, gathe[r] data from actual practice, analyz[e] the data, and revis[e] the Guidelines over time." *Id.* In support of its monitoring function, the Commission reviews the charging and sentencing documents for approximately 65,000 cases per year. *See* Commission, *2002 Annual Report*, at 40; *Mistretta*, 488 U.S. at 369. This effort enables the Commission to ensure uniformity in federal sentencing. From these cases, the Commission "codes up to 262 pieces of information about each guidelines sentencing that occurs in federal court. The resulting, steadily expanding database is an invaluable source of information for the Commission as it monitors guidelines application and refines the Guidelines Manual." *See* William W. Wilkins, Jr. & John R. Steer, *The Role of Sentencing Guidelines Amendments in Reducing Unwarranted Sentencing Disparity*, 50 Wash. & Lee L. Rev. 63, 65 (1993).[6] As this Court has explained, "Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial interpretations might suggest." *Braxton v. United States*, 500 U.S. 344, 348 (1991). And the Commission has done exactly that. Since

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[6] The Commission also uses the database to evaluate whether the Guidelines have achieved the goals of the Sentencing Reform Act. To that end, the Commission will be issuing a report reflecting how the Guidelines have met the goals of the Act. *See* Commission, *Fifteen Years of Guideline Sentencing* (forthcoming Fall, 2004).

the promulgation of the original set of Guidelines through the present, the Commission has continuously amended the Guidelines to respond to court decisions, congressional directives, and the Commission's own evaluations of the need for refinements. Indeed, as of the current manual, there have been 662 amendments. *See generally*, *Guidelines Manual*, App. C (2003). These amendments automatically take effect within a 180-day waiting period, unless otherwise modified or disapproved by Act of Congress. *See* 28 U.S.C. § 994(p).[7]

SUMMARY OF THE ARGUMENT

The imposition of a Guidelines sentence based on a judge's determination of a fact neither found by a jury nor admitted by a defendant does not violate the Sixth Amendment to the United States Constitution. It does not do so for two primary reasons.

I. Distinctions between the Guidelines and the Washington sentencing scheme considered in *Blakely* demonstrate that judicial factfinding under the Guidelines does not violate the Sixth Amendment. Unlike the Washington sentencing scheme, the Guidelines do not alter the statutorily prescribed range of penalties to which a criminal defendant is exposed. Instead, the Guidelines assign weights to traditional sentencing factors *within* statutory constraints. In addition, the Washington sentencing scheme invalidated by this Court is statutory, whereas the Guidelines are not purely legislative enactments, further rendering *Blakely* inapplicable to the Guidelines.

[7] This is similar to the rule making process governing the Federal Rules of Criminal Procedure and the Federal Rules of Evidence. *See* 28 U.S.C. § 2074(a).

II. The maximum sentence a federal judge may impose based on a jury verdict or facts admitted by a defendant is the statutory maximum set by Congress in the relevant federal statute. Indeed, under the Act, any additional facts found by a judge at sentencing pursuant to the Guidelines cannot increase a sentence beyond the statutory maximum set by Congress. Thus, because Congress, not the Commission, sets the statutory maximum, *Blakely* is inapplicable to the Guidelines. Similarly, Congress may establish a statutory mandatory minimum sentence that trumps a lower guideline range. Considerable precedent grounded in sound reasoning supports this view.

ARGUMENT

I. CRITICAL DIFFERENCES BETWEEN THE NATURE OF THE GUIDELINES AND THE WASHINGTON STATUTORY SCHEME DEMONSTRATE THAT THE IMPOSITION OF A GUIDELINE SENTENCE DOES NOT VIOLATE THE SIXTH AMENDMENT

In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the Court announced the rule that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Apprendi* and its progeny, the Court invalidated state statutory sentencing schemes that extended the authority of judges to impose a sentence above a statutory maximum. By contrast, the Guidelines constrain a court's sentencing authority within the boundaries of a legislatively determined maximum penalty, and (where applicable) a mandatory minimum penalty. Consequently, the rule announced in *Apprendi* does not apply to a guideline sentence that falls below the Congressionally prescribed statutory maximum.

An examination of how the Guidelines were crafted highlights the critical distinctions that separate the Guidelines from the state statutory scheme at issue in *Blakely*.

A. The Guidelines Assign Weights To Traditional Sentencing Factors Within Statutory Constraints

In response to the Act, the Commission began the Herculean task of creating a workable guidelines scheme. As it undertook its mission, the Commission was required to "resolve a host of important policy questions typically involving rather evenly balanced sets of competing considerations." *See Guidelines Manual*, § 1A1.1, cmt. Intro. and Gen. App. Principles, (A)(4) (2003). Among those questions, the Commission had to decide whether appropriate punishment would be defined primarily on the principles of "just deserts" or "crime control." Consistent with the Act's "rejection of a singly doctrinal approach in favor of one that would attempt to balance all the objectives of sentencing," the Commission did not choose one theory over the other. *See* Commission, *Supplementary Report on Initial Sentencing Guidelines and Policy Statements* (1987) [hereinafter "*Supplementary Report on Initial Guidelines*"] at 16. Instead, the "Guidelines embody aspects of both just desert and crime-control philosophies of sentencing [and] give effect to both considerations." *Id.*[8]

[8] By contrast, the Washington legislature adopted a "just deserts" philosophy of sentencing. David Boerner, *The Role of the Legislature in Guideline Sentencing in the Other Washington*, 28 Wake Forest L. Rev. 381 (1993) (hereinafter *Boerner*); *see also* Wash. Rev. Code Ann. § 9.94A.850 (West 2003).

The Commission's task was compounded by the complexity of the federal criminal code. As noted by Justice Richard H. Poff, a jurist of the Supreme Court of Virginia and a former Vice-Chair of the Brown Commission, the federal system had "innumerable statutes dealing with such basic offenses as theft and fraud" that were "scattered about hither and yon among various titles of the United States Code" resulting in "conflicting court interpretations." Commission, *Preliminary Report to the Congress: Statutory Penalties Project Description and Compilations of Federal Criminal Offenses* (1989), at vi (quoting *Reform of the Federal Criminal Laws, Hearings Before the Subcommittee on Criminal Law and Procedures of the Senate Committee on the Judiciary*).[9] Because the major goal of the Act was to increase uniformity in sentencing, while not sacrificing proportionality, the guidelines had to "authorize appropriately different sentences for criminal conduct of significantly different severity." Commission, *Supplementary Report to the Congress: Statutory Penalty Review Project* (1991), at 13.

As a starting point for the Commission's work, it utilized an empirical approach, examining detailed data from more than 10,000 presentence investigations and less detailed data on nearly 100,000 federal convictions. The Commission also examined the United States Parole Commission's guidelines and resulting statistics, public commentary and information from other relevant sources to determine existing sentencing practices. *See Supplementary*

[9] The first Guidelines manual listed over 700 penal statutes or subsections thereof in Appendix A, *see Guidelines Manual*, App. A (1987), and the current manual references over 1200 different statutes or subsections thereof. *See Guidelines Manual*, App. A (2003).

Report on Initial Guidelines, at 16. "This approach provided a concrete starting point and identified a list of relevant distinctions that, although of considerable length, [was] still short enough to create a manageable set of guidelines." *Id.* From these distinctions, the Commission was able to create a sentencing guidelines scheme that was not too complex to be workable, but not so simple that it overlooked harms that resulted from the defendant's criminal conduct. *See Guidelines Manual* § 1A1.1, cmt. Intro. and Gen. Principles, (A)(3) (2003).

Importantly, the Commission examined existing state guidelines systems, including the Washington system at issue in *Blakely*. *Supplementary Report on Initial Guidelines*, at 14. The Commission rejected the approach used by many states, concluding that "[s]tate guidelines systems which use relatively few, simple categories and narrow imprisonment ranges . . . are ill suited to the breadth and diversity of federal crimes.." *Id.* For example, under many states' systems, "a single category of robbery . . . lumped together armed and unarmed robberies, robberies with and without injuries, [and] robberies of a few dollars and robberies of millions," and thus "would have been far too simplistic to achieve just and effective [federal] sentences, especially given the narrowness of the permissible sentencing ranges." *Supplementary Report on Initial Guidelines*, at 13. Consequently, the Commission determined that the Guidelines should be descriptive of generic conduct, rather than track statutory language. *See Guidelines Manual* § 1A1.1, cmt. Intro. and Gen. App. Principles, (A)(4)(a) (2003).

Further, consistent with the past sentencing practices of judges and the Parole Commission, the Commission decided to create a system requiring a court to consider, within constraints, a defendant's "real" offense conduct. In

creating the Guidelines, the Commission conducted a study of past sentencing practices and arrived at a list of relevant factors that courts traditionally employed to arrive at a sentence in the indeterminate scheme. The Commission then assigned "weights" to these factors, thereby guiding courts' discretion in how each factor would impact the calculation of the sentence. Significantly, while the Commission's list of factors included elements of the offense, it also included harms associated with the crime. Just as they had always done, courts could therefore consider a number of important, commonly occurring, real offense harms, while preventing prosecutors from influencing sentences by increasing or decreasing the number of counts in an indictment. *See Guidelines Manual* § 1A1.1, cmt. Intro. and Gen. App. Principles (A)(4)(a) (2003). The factors incorporated by the Commission into the Guidelines consisted of factors that have traditionally been considered appropriate sentencing factors under indeterminate sentencing systems. *See Blakely*, 124 S.Ct. at 2540 ("Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion."); *see also* 18 U.S.C. § 3661.

B. The Guidelines Cabin Judicial Discretion Within Statutory Limitations

The operation of the Guidelines has always been constrained by the statutorily imposed sentencing limits, both minimum and maximum. This principle, enunciated by Congress in title 28, section 994(b)(1) of the U.S. Code, is incorporated in *Guidelines Manual* § 5G1.1. *See Guidelines Manual*, § 5G1.1 (2003). The impact of the statutory maxima on guideline sentences is especially critical given the broad range of maxima reflected in the United States Code. For example, the federal fraud statutes directed to

§ 2B1.1 of the *Guidelines Manual* include maxima as low as one year (*see, e.g.*, 18 U.S.C. § 1003) and as high as thirty years (*see, e.g.*, 18 U.S.C. § 1344). *See Guidelines Manual*, § 2B1.1 (2003). The Guidelines computation for a conviction under either of these fraud statutes results from the compilation of a base offense level that is applicable to fraud offenses generally and myriad other factors depending on the manner in which the crime was committed. As the offense level increases based on traditional discretionary factors, so will the applicable Guidelines range. The Guidelines, however, make clear that a defendant will be subjected to no more than the maximum statutory penalty set by Congress for the offense of conviction.

C. The Washington State Legislature Devised And Maintained The Sentencing System At Issue In *Blakely*

Washington state's sentencing scheme is fundamentally different from the Guidelines. The Washington state sentencing commission is an agent of the legislature, not part of the judicial branch. Unlike the Commission, the Washington commission cannot promulgate guidelines that become automatically effective. Rather, it proposes guidelines, that the legislature must affirmatively enact. *See*, Wash. Rev. Code Ann. § 9.94A.850 (West 2003); *Boerner*, at 387. Thus, the Washington guidelines scheme is purely statutory, and the state courts therefore have little, if any, influence over sentencing policies. *See State v. Ammons*, 713 P.2d 719, 723 (Wash. 1986) (*en banc*) ("The trial court's discretion in sentencing is that which is given by the Legislature"); *State v. Freitag*, 896 P.2d 1254, 1256 (Wash. 1995) (*en banc*) ("[I]t is the function of the judiciary to impose sentences consistent with legislative enactments.").

The Washington legislature rejected an approach utilizing "real harms" and tied the presumptive range solely to the offense of conviction and prior criminal history. David Boerner & Roxanne Lieb, *Sentencing Reform in the Other Washington*, 28 Crime and Justice 71, 88 (M. Tonry, ed. 2001); *see also* Wash. Rev. Code Ann. § 9.94A.510 (West 2003). Under the Washington scheme, the legislature assigned each penal offense a seriousness level that is a function of the statute of conviction. *See* Wash. Rev. Code Ann. § 9.94A.520 (West 2003). The current statute setting forth seriousness levels for the Washington penal statutes lists approximately 174 offenses. *See* Wash. Rev. Code Ann. § 9.94A.515 (West 2003). The legislature directed that the offense seriousness levels rank property crimes in the lower levels and crimes against persons in the upper levels. *Boerner*, at 390. With notable exceptions (*e.g.*, use of a firearm), harms associated with the crime of conviction do not impact the sentence. As such, any defendant convicted of a particular crime will be assigned the same severity level as any other defendant convicted of the same crime.

The Washington Sentencing Reform Act (the "Washington Act") requires the judge to impose a sentence within the presumptive range, absent extraordinary circumstances. *See* Wash. Rev. Code Ann. § 9.94A.505 (West 2003). That range, and not the broader statutory maximum for the class of felony committed, is always applied unless the court finds that there exists "substantial and compelling reasons justifying an exceptional sentence." *See* Wash. Rev. Code Ann. §9.94A.535 (West 2003). A factor is a permissible reason for imposing an exceptional sentence only if it is not already taken into account in the calculation of the presumptive range. Moreover, "[f]acts that establish the elements of a more serious crime or additional crimes may not be used to go outside the standard sentence range except upon stipulation or when specifically provided

for in RCW 9.94A.535(2)(d), (e), (g), and (h)." Wash. Rev. Code Ann. § 9.94A.530 (2) (West 2003).

In *Blakely*, Petitioner pled guilty to second-degree kidnaping involving domestic violence and use of a firearm, a class B felony, and entered a guilty plea admitting the elements of second-degree kidnaping and the domestic-violence and firearm allegations, but no other relevant facts. *Blakely*, 124 S.Ct. at 2534-35. A Washington state statute provided "[n]o person convicted of a [class B] felony shall be punished by confinement . . . exceeding . . . a term of ten years." *Id.* at 2535. However, the Washington Act further limited the range of sentences a judge could impose. For petitioner's offense of second-degree kidnaping with a firearm, the Act provided for a statutory "standard range" of 49 to 53 months. *Id.* at 2535 (citing Washington Act § 9.94A.320). The Washington Act permitted the court to impose a sentence above the standard range if it found "substantial and compelling reasons justifying an exceptional sentence." *Id.* (citing Washington Act § 9.94A.120(2)). Pursuant to this enhancement section, and after hearing a description of the kidnaping, the judge found that Petitioner had acted with deliberate cruelty and imposed an "exceptional sentence of 90 months – 37 months beyond the standard maximum." *Id.* Significantly, under Washington state law, "deliberate cruelty" is identified as an element of a more serious offense. *See* Wash. Rev. Code Ann. § 9.94A.530 (2) (West 2003). Thus, the enhancement mechanism in operation under state law allowed the court to penalize Blakely for the commission of an aggravated offense. *See Blakely*, 124 S. Ct. at 2539 ("Petitioner argued below that second-degree kidnaping with deliberate cruelty was essentially the same as first-degree kidnaping, the very charge he had avoided by pleading to a lesser offense."). In other words, by extending the court's discretion to enable it to find facts that are elements of other offenses, state law

allowed "judicial impingement upon the traditional role of the jury . . . ." *id.*, at 2540, thereby violating the *Apprendi* rule. By contrast, the Guidelines operate not to extend, but rather to constrain, the court's discretion.

Blakely did not conclude that the source of the "statutory maximum" is irrelevant. That the Guidelines are not statutes *is* relevant. *See United States v. Booker*, 375 F.3d 508, 519-20 (7th Cir. 2004) (Easterbrook, J., dissenting). "Statutory" in the phrase "statutory maximum" is not "an inept shorthand." *Id.* at 519. Because Congress sets the maximum and minimum penalties for federal crimes in the relevant statutes as explained below, and such penalties are not set in the Guidelines, a jury verdict or guilty plea authorizes any sentence up to the statutory maximum and above the statutory minimum. *Id.* Consequently, what happens after the jury verdict or plea "is unrelated to the sixth amendment" and thus, "the rule of *Apprendi* and *Blakely* is confined to statutes." *Id.* That the Washington sentencing scheme is statutory is therefore a constitutionally significant distinction between the Guidelines and the Washington scheme.

II. THE STATUTORY PENALTY SET BY CONGRESS FOR A FEDERAL CRIME, AND NOT THE SENTENCING GUIDELINE RANGE, ESTABLISHES THE PRESCRIBED STATUTORY MAXIMUM FOR SIXTH AMENDMENT PURPOSES

A. The Guidelines Do Not Establish The Statutory Maximum Penalty For Any Criminal Offense

The Commission is not authorized to establish statutory maximum penalties; rather, when creating the

Commission and delegating powers to it, Congress clearly manifested its intent to reserve the power to set maximum penalties. It established that the Commission may only recommend to Congress whether maximum penalties should be modified. *See* 28 U.S.C. § 994(r). The legislative history supports this view. Indeed, the Senate Committee on the Judiciary indicated that the Committee believed that the Commission would be in a particularly good position to make such recommendations to the Congress. *Senate Report*, No. 98–225, at 179.

The Guidelines themselves further bolster the understanding that the Commission's role is limited. As amended, the Guidelines are replete with examples of the controlling impact of congressional changes to statutory penalties on Guideline sentencing ranges. *See, e.g.*, *Guidelines Manual*, App. C (2003) Amend. 95 (amending section to "reflect increased maximum sentences for certain conduct covered by this guideline"); Amend. 139 (reflecting "increased statutory mandatory minimum penalties for offenses pursuant to Section 6481 of the Anti-Drug Abuse Act of 1988"); Amend. 556 (reflecting increases in maximum penalties for offenses involving trafficking and simple possession of flunitrazepam); Amend. 595 (reflecting statutory changes to methamphetamine quantities triggering mandatory minimum sentences); Amend. 598 (reflecting changes to mandatory minimum sentences in 18 U.S.C. § 924(c)); Amend. 600 (same); Amend. 642 (same); Amend. 652 (reflecting increase in statutory maximum sentence for involuntary manslaughter); Amend. 653 (increasing base offense level for fraud offense to reflect the increased statutory maximum sentences made by the *Sarbanes-Oxley Act of 2002*, Pub. L. 107–204, 116 Stat. 745 (2002)).

A number of congressional directives to the Commission, enacted subsequent to the Act, also evidence

continuing legislative intent that the Guidelines work within the available statutory penalty parameters. *See, e.g.*, *Identity Theft and Assumption Deterrence Act of 1998*, Pub. L. 105-318, § 4, 112 Stat. 3009 (1998) (amending 18 U.S.C. § 1028) (requiring the Commission to consider, for certain identity theft offenders, the extent to which the guideline sentences for the offense have been constrained by previously existing statutory maximum penalties); *Wireless Telephone Protection Act*, Pub. L. 105-172, § 2(e), 112 Stat. 55 (1998) (amending 18 U.S.C. § 1029) (directing the Commission to review and amend the sentencing guidelines to address offenses involving the cloning of a wireless telephone).[10]

The consistently expressed legislative and Commission intent is that the Guidelines structure and constrain judicial sentencing discretion within legislated penalty parameters. Were *Blakely* to be extended to apply to the Guidelines such that the penalties therein expressed are deemed statutory maxima, the Guidelines would have been elevated to a legal status clearly contrary to that intent.

B. The Court Has Recognized That The Guidelines Do Not Establish The "Statutory Maximum" For Any Criminal Offense

When this Court first upheld the constitutionality of the Guidelines in *Mistretta*, it repeatedly recognized that the Commission lacks the authority to prescribe any statutory maxima for federal crimes. *See Mistretta*, 488 U.S. at 391, 396. The Court further explained that "the Sentencing

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[10] The only Guideline provision that allows the court to "impose a sentence without regard to any statutory minimum sentence" requires a defendant to meet criteria set forth in 18 U.S.C. § 3553 (f)(1)-(5). *See Guidelines Manual* § 5C1.2 (2003).

Commission is devoted exclusively to the development of rules to *rationalize a process that has been and will continue to be performed exclusively by the Judicial Branch.*" *Id.* at 407 (emphasis added). The jury traditionally had no role at the sentencing phase of the criminal case. Thus, the Guidelines do not "infringe[] upon the province of the jury," any more than the post-verdict or post-plea judicial factfinding this Court finds constitutional in indeterminate schemes. *Blakely*, 124 S.Ct. at 2540.

This Court has long recognized the differences between the sentencing ranges imposed by the Guidelines and those imposed statutorily by Congress. For example, in *Stinson v. United States*, 508 U.S. 36 (1993), the Court equated the Guidelines with rules adopted by federal agencies, stating that the "Sentencing Commission promulgates the guidelines by virtue of an express congressional delegation of authority for rule-making, and through the informal rule-making procedures in 5 U.S.C. § 553." *Stinson*, 508 U.S. at 45 (internal citations omitted). Citing precedent that an agency's interpretation of its own regulations must be given controlling weight, so long as it does not violate the Constitution or a *federal statute* and is not plainly erroneous or inconsistent with the regulation, this Court upheld as binding the commentary that a felon-in-possession offense does not constitute a crime of violence for purposes of *Guideline Manual* § 4B1.2. *Id.* at 45-47 (emphasis added).[11]

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[11] This Court has further recognized the distinction between statutory maxima established by Congress and the Guidelines in Rule 11 of the Federal Rules of Criminal Procedure. Indeed, since 1974, Rule 11 has expressly mandated that prior to acceptance of a guilty plea, a court must inform and be assured that a defendant understands the maximum possible sentence of imprisonment and any mandatory minimum sentence. *See* Fed. R. Crim. P. 11(b)(1)(H), 11(b)(1)(I); Fed. R. Crim. P. 11 advisory committee's note (concerning 1974 amendments). The Advisory Committee notes indicate that these changes were made "to insure that a defendant knows what minimum sentence the judge **must** impose and what maximum sentence the judge **may** impose." *See* Fed. R. Crim. P. 11 advisory committee's note (concerning 1974 amendments) (emphasis in original). As the Committee recognized, the minimum and maximum sentence "is usually readily ascertainable from the face of the statute defining the crime, and thus it is feasible for the judge to know specifically what to tell the defendant. Giving this advice tells a defendant the shortest mandatory sentence and also the longest possible sentence for the offense to which he is pleading guilty." *Id.* Pursuant to a provision adopted in 1989, the Rule now also instructs the court to inform a defendant of its obligation to apply the Guidelines, including its discretion to depart under some circumstances. *See* Fed. R. Crim. P. 11(b)(1)(M). However, in contrast to the 1974 amendment requiring explicit notice of the maximum penalty authorized by statute, "the amendment does not require the court to specify which guidelines will be important or which grounds for departure might prove to be significant" at the time of the plea because "it will be impracticable, if not impossible, to know which guidelines will be relevant prior to the formulation of a presentence report and resolution of disputed facts." *See* Fed. R. Crim. P. 11 advisory committee's note (concerning 1989 amendment). Thus, under current federal rules, at the time of entry of a guilty plea, a defendant need only be informed of the maximum and minimum statutory penalties adopted by Congress. The defendant need not be told of any possible Guidelines calculation. Indeed, the Rule only requires that the defendant be told that the Guidelines exist and that the court is authorized to depart from the Guidelines calculation subsequently determined.

Three years later, in *Neal v. United States*, 516 U.S. 284 (1996), this Court reiterated the distinction between the Guidelines and statutes, indicating that Congress' pronouncements trump the Commission's. Specifically, the Court considered whether the revised system for determining

LSD amounts under the Guidelines required reconsideration of the method used to determine statutory minimum sentences announced in *Chapman v. United States*, 500 U.S. 453 (1991). Shortly after the Court announced its decision in *Chapman*, the Commission revised the method of calculating the weight of LSD in the Guidelines, and used a different method from the one required by *Chapman*. *See Guidelines Manual*, App. C., Amend. 488 (1995). The Petitioner urged the Court to hold that the Commission's method of calculating the weight of LSD was the appropriate method, but the Court rejected this position. *Neal*, 516 U.S. at 289-90. In so doing, the Court stated that "[w]hile acknowledging that the Commission's expertise and the design of the Guidelines may be of potential weight and relevance in other contexts, we conclude that the Commission's choice of an alternative methodology for weighing LSD does not alter our interpretation of the statute in *Chapman*." *Id.* at 290. Thus, the Court reaffirmed the principle that the Guidelines must defer to legislative dictates.

Similarly, in *United States v. LaBonte*, 520 U.S. 751 (1997), this Court once again made clear that the Guidelines must give way to congressional pronouncements. In that case, this Court considered the meaning of the phrase "maximum term authorized" used in 28 U.S.C. § 994(h). The Commission had determined that the maximum term available for the offense of conviction did not include any applicable statutory sentencing enhancements. *Id.* at 752-53. The Court rejected this view. Although recognizing the Commission's broad discretion to create guidelines, the Court held that such discretion "must bow to the specific directives of Congress" and "if the Commission's revised commentary is at odds with § 994(h)'s plain language, it must give way." *Id.* at 757. The Court went on to state "[w]e conclude that the Commission's interpretation is

inconsistent with § 994(h)'s plain language, and therefore hold that 'maximum term authorized' must be read to include all applicable statutory sentencing enhancements." *Id.* at 753. "Accordingly, the phrase 'maximum term authorized' should be construed as requiring the 'highest' or 'greatest' sentence allowed by *statute*." *Id.* at 758 (emphasis added). This holding supports a determination that the prescribed statutory maximum for federal crimes is also the highest or greatest allowed by the statute of conviction, not the applicable guideline range.

Further support for the Commission's understanding of the limitations on its authority to impact statutory penalties can be derived from this Court's holding in *United States v. Melendez*, 518 US. 120, 122 (1996). There, the Court held that a motion by the government for a departure from the applicable guidelines range pursuant to *Guidelines Manual* § 5K1.1 does not also authorize a departure from the statutory minimum mandatory sentence absent a government request for such a departure. Implicit in the Court's holding is a distinction between statutes (in this instance, 18 U.S.C. § 3553(e)) and the Guidelines. Once again, this underscores the principle that statutes trump the Guidelines.

C: Considerable Precedent Supports The View That Factfinding Under The Guidelines Does Not Violate The Sixth Amendment Because The Guidelines Do Not Set Statutory Maxima

To conclude that factfinding under the guidelines violates the Sixth Amendment, the Court would have to

overrule or distinguish considerable recent precedent.[12] Perhaps most notably, the Court would have to overrule or substantially limit *Edwards v. United States*, 523 U.S. 511 (1998). In *Edwards*, the government charged petitioners with violating 21 U.S.C. §§ 841 and 846 by conspiring "to possess with intent to distribute . . . mixtures containing" two controlled substances, namely, "cocaine . . . and cocaine base" (i.e., "crack"). *Edwards*, 523 U.S. at 512-13. After the district court judge instructed the jury that "the government must prove that the conspiracy . . . involved measurable amounts of cocaine or cocaine base," the jury returned a general verdict of guilty." Following the jury verdict, the judge imposed sentences based on his finding that each petitioner's illegal conduct had involved both

[12] *See, e.g., United States v. Watts*, 519 U.S. 148, 152 (1997) (holding that judge may enhance a defendant's sentence based on "facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted") (citing *United States v. Donelson*, 695 F.2d 583, 590 (D.C. Cir. 1982) (Scalia, J.); *Witte v. United States*, 515 U.S. 389, 403 (1995)) (allowing use of relevant conduct, stating that the "relevant conduct provisions of the Sentencing Guidelines, like their criminal history counterparts and the recidivism statutes discussed above, are sentencing enhancement regimes evincing the judgment that a particular offense should receive a more serious sentence within the authorized range if it was either accompanied by or preceded by additional criminal activity"); *United States v. Dunnigan*, 507 U.S. 87, 97 (1993) (upholding court's determination that defendant obstructed justice pursuant to *Guideline Manual* § 3C1.1 by committing perjury at trial and rejecting "respondent's argument that the § 3C1.1 sentence enhancement advances only 'the impermissible sentencing practice of incarcerating for the purpose of saving the Government the burden of bringing a separate and subsequent perjury prosecution.'").

cocaine *and* crack. *Id.* at 513. On appeal to the Seventh Circuit Court of Appeals, the petitioners argued that the word "'or' in the judge's instruction meant that the judge had to assume that the conspiracy involved only cocaine" because the Guidelines treat that drug more leniently than crack. *Id.* The Seventh Circuit Court of Appeals affirmed, and the petitioners sought review in this Court.

Before this Court, petitioners argued that their "Fifth and Sixth Amendment rights to a jury determination of all the essential elements of the offense is defeated in this case unless the Petitioners are sentenced on the agreement carrying the lesser punishment." *Edwards Brief for Petitioners*, 1997 WL 793079 at *30 (Dec. 17, 1997). However, in a unanimous opinion affirming the Seventh Circuit, the Court squarely *rejected* this argument because the petitioners' sentence did not exceed the maximum sentence as set by Congress. *Edwards*, 523 U.S. at 515 ("Of course, petitioners' statutory and constitutional claims would make a difference if it were possible to argue, say, that the sentences imposed exceeded the maximum that the statutes permit for a cocaine--only conspiracy").

Moreover, according to the Court, traditional sentencing factors, like those contained in the Guidelines, are not subject to Sixth Amendment constraints. In *Harris v. United States*, 536 U.S. 545 (2002), for example, the Court explained that "not all facts affecting the defendant's punishment are elements . . . [and] these facts, sometimes referred to as sentencing factors, [do not need] to be alleged in the indictment, submitted to the jury, or established beyond a reasonable doubt." *Harris*, 536 U.S. at 549-50. In light of this principle, the Court distinguished the factual findings at issue in *Apprendi* with those at issue in *Harris*, noting that "any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would

have been considered an element of an aggravated crime – and thus the domain of the jury – by those who framed the Bill of Rights." *Id.* at 557-58 (emphasis added). Then, citing to *Apprendi*, 530 U.S. at 498, the Court noted that the "Fifth and Sixth Amendments ensure that the defendant 'will never get more punishment than he bargained for when he did the crime,' but they do not promise that he will receive 'anything less' than that." *Id.* at 566. Turning its attention to the statute at issue, the Court concluded that it was constitutional and did not evade the requirements of the Fifth and Sixth Amendment because "Congress 'simply took one factor that has always been considered by sentencing courts to bear on punishment . . . and dictated the precise weight to be given that factor.'" *Id.* at 559, citing *McMillan v. Pennsylvania*, 477 U.S. 79, 89-90 (1986). "That factor need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt." *Id.*

This Court has always recognized that the Guidelines, like the mandatory minimum at issue in *Harris*, constrain, and do not extend, the court's authority. Because the Guidelines do not "alter the *congressionally prescribed* range of penalties to which a criminal defendant is exposed," *Jones v. United States*, 526 U.S. 227, 253 (1999) (Scalia, J., concurring) (emphasis added), the Guidelines do not implicate the Sixth Amendment concerns raised in *Blakely*.

III. CONCLUSION

For the foregoing reasons, the Court should reverse the decisions of the lower courts and hold that the Guidelines do not prescribe statutory maxima, and a Guideline sentence involving judicial factfinding therefore does not violate the Sixth Amendment to the United States Constitution.

Respectfully submitted,

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Nos. 04-104 & 04-105

Supreme Court, U.S.
SEP 21 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

FREDDIE J. BOOKER,
Respondent.

and

UNITED STATES OF AMERICA,
Petitioner,

v.

DUCAN FANFAN,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit and the United States Court of Appeals for the First Circuit

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BRIEF FOR THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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September 21, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. *BLAKELY* APPLIES TO THE UNITED STATES SENTENCING GUIDELINES. 4

A. The Guidelines Are Effectively Statutory for Purposes of a *Blakely* Analysis 4

B. Regardless of Whether the Guidelines Are Considered "Statutory," They Establish "Legal Right[s]" and Therefore Create Jury Rights 7

II. APPLICATION OF *BLAKELY* TO THE GUIDELINES WILL RESULT IN SENTENCING REFORM THAT FULFILLS THE GOALS OF THE SRA AND RESPECTS DEFENDANTS' SIXTH AMENDMENT RIGHTS. 18

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

Apprendi v. New Jersey, 530 U.S. 466 (2000) 4, 14
Blakely v. Washington, 124 S. Ct. 2531 (2004) ..... *passim*
Harris v. United States, 536 U.S. 545 (2002) 21
Koon v. United States, 518 U.S. 81 (1996) 17
McMillan v. Pennsylvania, 477 U.S. 79 (1986) 15
Mistretta v. United States, 488 U.S. 361 (1989) 4, 5, 19
New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) 24
Stinson v. United States, 508 U.S. 36 (1993) 6
Thurston v. United States, 72 U.S.L.W. 3769 (U.S. June 16, 2004) (No. 03-1670) 2
United States v. Chaparro, No. Crim. EP-92-CR-283KC, 2004 WL 1946454 (W.D. Tex. Sept. 1, 2004) 13
United States v. Colon, 961 F.2d 41 (2d Cir. 1992) 10
United States v. Croxford, 324 F. Supp. 2d 1255 (D. Utah 2004) 7
United States v. Ebbole, 917 F.2d 1495 (7th Cir. 1990) 10
United States v. Green, No. CR. A. 02-10054, 2004 WL 1381101 (D. Mass. June 18, 2004) ..... *passim*
United States v. Hammoud, No. 03-4253, 2004 WL 2005622 (4th Cir. Sept. 8, 2004) 7, 15
United States v. Kinter, 235 F.3d 192 (4th Cir. 2000) 6
United States v. Marrero, 325 F. Supp. 2d 453 (S.D.N.Y. 2004) 7
United States v. McNab, 331 F.3d 1228 (11th Cir. 2003), *cert. denied*, 124 S. Ct. 1407 (2004) 1, 12

United States v. Pineiro, 377 F.3d 464 (5th Cir. 2004) 9-10
United States v. Rodriguez, 67 F.3d 1312 (7th Cir. 1995) 10
United States v. Smiley, 997 F.2d 475 (8th Cir. 1993) 9
United States v. Thurston, 358 F.3d 51 (1st Cir. 2004), *petition for cert. filed*, 72 U.S.L.W. 3769 (U.S. June 16, 2004) (No. 03-1670) 10, 11, 18
United States v. Weinberger, 91 F.3d 642 (4th Cir. 1996) 16
Washington Legal Foundation v. United States Sentencing Commission, 17 F.3d 1446 (D.C. Cir. 1994) 1
Washington Legal Foundation v. United States Sentencing Commission, 89 F.3d 897 (D.C. Cir. 1996) 1

STATUTES AND REGULATIONS

18 U.S.C. § 3553(a) 2, 19
18 U.S.C. § 3553(b) 6, 16
18 U.S.C. § 4205(a) (1976) (repealed 1984) 12
28 U.S.C. § 991(a) 4
28 U.S.C. § 994(p) 5
Federal Sentencing Guidelines, Amendments, Disapproval, Pub. L. No. 104-38, 109 Stat. 334 (1995) 5
PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650 (2003) 5, 6, 17
Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 6

28 C.F.R. § 2.20, Chapter Eleven, Subch. H – Environmental Offenses, 1172(d) 12

U.S.S.G. § 5K2.0 16

LEGISLATIVE MATERIAL

S. Con. Res. 130, 108th Cong. (July 22, 2004) 20

S. Rep. No. 98-225 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182 19-20

Blakely v. Washington *and the Future of the Federal Sentencing Guidelines: Hearings Before the Senate Comm. on the Judiciary*, 108th Cong. (July 13, 2004), *available at* http://judiciary.senate.gov/hearing.cfm?id= 1260 ..... 19, 20, 21, 24

MISCELLANEOUS

ALI Report, *Model Penal Code: Sentencing* (Apr. 11, 2003) 23

Vikram David Amar, *When – If Ever – Can Facts Found By Judges Lengthen Criminal Sentences?* (Sept. 7, 2004), *at* http://writ.news.findlaw.com/amar/20040907.html 8

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INTEREST OF *AMICI CURIAE*

The Washington Legal Foundation ("WLF")[1] is a national non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF devotes substantial resources to litigating cases and filing *amicus curiae* briefs in this and other federal courts, endorsing a limited and accountable government, promoting separation of powers, and opposing abusive civil and criminal enforcement actions by regulatory agencies and the Department of Justice.

Since the U.S. Sentencing Commission's establishment over seventeen years ago, WLF has submitted comments to and has testified before the Commission on several occasions regarding the promulgation and application of various guidelines.[2] In particular, WLF has been critical of the Guidelines and their application because they mandate excessively harsh prison sentences, particularly with respect to minor regulatory infractions. *See, e.g., United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003), *cert. denied*, 124 S. Ct. 1406 (2004) (97-month prison sentence for importing frozen lobster tails in clear plastic bags instead of cardboard boxes in violation of obscure Honduran regulation that the

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[1] Pursuant to S. Ct. R. 37.6, *amici* hereby affirm that no counsel for either party authored any part of this brief, and that no person or entity other than WLF and its counsel provided financial support for preparation or submission of this brief. By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief.

[2] WLF has also taken the Commission and its advisory committees to task and to court for failing to operate in a transparent manner in the formulation of Commission policy. *See Washington Legal Found. v. United States Sentencing Comm'n*, 89 F.3d 897 (D.C. Cir. 1996); *Washington Legal Found. v. United States Sentencing Comm'n*, 17 F.3d 1446 (D.C. Cir. 1994).

Honduran government admitted was invalid); *see also* Tony Mauro, *Lawyers Seeing Red Over Lobster Case*, Legal Times (Feb. 16, 2004). WLF has also urged this Court to grant a pending petition for writ of certiorari in *Thurston v. United States*, 72 U.S.L.W. 3769 (U.S. June 16, 2004) (No. 03-1670), a case in which the Guidelines mandate disparity of the grossest sort between similarly situated co-defendants, namely, a five-year statutory maximum sentence for Mr. Thurston and probation for his more culpable co-defendant.

The Allied Educational Foundation ("AEF") is a non-profit public policy organization based in Englewood, New Jersey. Founded in 1964, AEF promotes diverse areas of study in public policy issues and has appeared as *amicus curiae* along with WLF in numerous cases, including *Thurston*.

Amici believe that the Guidelines are constitutionally flawed, eliminate the exercise of the sound discretion of the sentencing judge, and effectively mandate unduly harsh and draconian sentences. Such sentences do not serve the fundamental principles of justice, and conflict with the congressional mandate that judges "*shall* impose a sentence sufficient, *but not greater than necessary*" to serve the purposes of punishment. 18 U.S.C. § 3553(a) (emphasis added).

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Blakely v. Washington*, 124 S. Ct. 2531 (2004), this Court held that "every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to punishment." *Id.* at 2540. In determining whether a judge has "inflict[ed] punishment that the jury's verdict alone does not allow," the "relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." *Id.* at 2537. As this Court

explained, "[t]he Framers would not have thought it too much to demand that, before depriving a man of . . . his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbours,' . . . rather than a lone employee of the State." *Id.* at 2543. Under these principles, the Sixth Amendment is violated when a federal judge, acting under the binding strictures of the federal Sentencing Guidelines, finds facts at the sentencing stage of a criminal case and inflicts punishment that would not have been legally permissible the judge had considered only the facts found by the jury. *Id.* at 2537.

In attempting to escape from this ineluctable conclusion, the government places tremendous weight on *Blakely*'s use of the term "statutory maximum," contending that the federal Guidelines are distinguishable from the unconstitutional Washington guidelines because the latter were "statutory" while the former are not. But this argument is doubly flawed. First, although the Guidelines are not enshrined in the United States Code, they are controlled directly by Congress and are statutory in all but name. Second, and more importantly, the distinction between statutory and non-statutory maximums is a distinction without a difference so far as the Sixth Amendment principle enunciated in *Blakely* is concerned. As *Blakely* clearly explains, the crucial question in determining the division of labor between judge and jury is whether the Guidelines establish a "legal right" – and the binding Guidelines plainly do so, despite judges' nominal departure power. Thus, particularly in the wake of the discretion-limiting Feeney Amendment, Congress has created an essentially determinate sentencing system for which it lacks legislative accountability and pursuant to which judicial fact-finding often increases defendants' sentences exponentially. This disproportionality characterizes not only drug cases such as *Booker* and *Fanfan*

themselves, but also cases involving minor regulatory infractions and other non-violent crimes. Such a flawed and unfair sentencing regime violates the Sixth Amendment.

Despite warnings that the sky is falling, this result does not threaten the workings of the federal criminal justice system. Congress has already considered a number of proposals for sentencing reform that protect defendants' Sixth Amendment rights and serve the original goals of the Sentencing Reform Act of 1984 ("SRA"). Indeed, given the intolerable flaws of the harsh Guidelines, against which federal judges have chafed for decades, a ruling that some or all of the Guidelines are invalid would present Congress with a rare opportunity to enact broad reforms that would reduce unwarranted sentencing disparities and result in fairer treatment of all defendants.

ARGUMENT

I. *BLAKELY* APPLIES TO THE UNITED STATES SENTENCING GUIDELINES.

A. The Guidelines Are Effectively Statutory for Purposes of a *Blakely* Analysis

As an initial matter, it is plain that the Guidelines are quasi-statutory – and fully statutory in every sense that matters under this Court's decision in *Blakely*. "[T]he relevant inquiry is one not of form, but of effect." *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000). It is true that the SRA describes the United States Sentencing Commission, which promulgates the Guidelines, as an "independent commission in the judicial branch of the United States." 28 U.S.C. § 991(a). But the Commission "is not a court, does not exercise judicial power, and is not controlled by or accountable to members of the Judicial Branch." *Mistretta v. United States*, 488 U.S. 361, 393 (1989); *see also* Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing*, Cato Policy Analysis, Nov. 1, 2002, at 8 ("[A] number of

scholars have shown that the commission simply became another political body, influenced by interest groups and susceptible to many of the pressures placed on lawmakers."). In the wake of the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 ("PROTECT Act"), no more than three of the Commission's members may be judges, ensuring that judges are in the minority. *See* PROTECT Act, Pub. L. No. 108-21, § 401(n)(1), 117 Stat. 650 (2003) (amending 28 U.S.C. § 991(a), which previously required "[a]t least three" members to be federal judges). And every sentencing guideline promulgated by the Commission must be ratified by Congress, which "can revoke or amend any or all of the Guidelines as it sees fit." *Mistretta*, 488 U.S. at 393-94 (Scalia, J., dissenting); *see also* 28 U.S.C. § 994(p) (giving Congress 180 days to examine guidelines promulgated by the commission and to "modif[y] or disapprove[]" them).

Congress's power to reject proposed Guidelines and to revoke or amend existing Guidelines is not a purely theoretical one. Congress has rejected guidelines promulgated by the Commission on a number of occasions, most notably rebuffing the Commission's repeated attempts to equalize the penalties for crimes involving crack cocaine and crimes involving powder cocaine at the level applicable to powder cocaine. *See* Federal Sentencing Guidelines, Amendments, Disapproval, Pub. L. No. 104-38, 109 Stat. 334 (1995); Special Report to Congress: Cocaine and Federal Sentencing Policy, 10 Fed. Sent. Rep. 184 (1998); American Bar Ass'n, Justice Kennedy Comm'n, *Report with Recommendations to the ABA House of Delegates* 39 & n.104 (Aug. 2004) (hereinafter "*Kennedy Comm'n Report*"). Congress has also expressly directed the Commission to make particular changes to the Guidelines. For instance, in 1994 Congress directed the Commission to promulgate a terrorism guideline with specific intent as an "appropriate

enhancement." *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120004, 108 Stat. 1796; *Kennedy Comm'n Report*, *supra*, at 42 ("Congress has increasingly controlled the agenda of the Commission through imposition of directives. On May 1, 2003, the Sentencing Commission submitted to Congress amendments in nine major subject areas. Five of the nine were directly responsive to statutory mandates, and the Commission's 2003-2004 agenda is also heavily weighted toward responding to Congress."). And, most strikingly of all, in the 2003 PROTECT Act Congress directly amended guidelines regarding child pornography, curbed judicial discretion to depart downward, and decreed that appellate courts would henceforth review criminal sentences de novo. *See* PROTECT Act § 401(b), (g), (I); Stephanos Bibas, Blakely*'s Federal Aftermath* 5 (2004), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/bibas_blakelys_federal_aftermath.pdf.

Not surprisingly, then, the Guidelines are binding on federal judges in exactly the same way that a statute is binding. *See Stinson v. United States*, 508 U.S. 36, 42 (1993) (holding that the Guidelines have the force of law); 18 U.S.C. § 3553(b) (requiring district court to "impose a sentence of the kind, and within the range" set by the Guidelines). Thus, as was true in the Washington system, judges who disregard the Guidelines face reversal by appellate courts. *See Blakely v. Washington*, 124 S. Ct. 2531, 2538 (2004) ("Had the judge imposed the 90-month sentence solely on the basis of the plea, he would have been reversed."); *see also, e.g., United States v. Kinter*, 235 F.3d 192, 200 (4th Cir. 2000).

For all of these reasons, the government's claim that the Guidelines' absence from the U.S. Code meaningfully distinguishes them from the Washington guidelines is a spurious one. *See generally* Bibas, *supra*, at 5 ("Any . . .

distinction [based on this Court's use of the term 'statutory'] would be illogical, as it would suggest that Congress may delegate to a commission power that it may not exercise itself."); *United States v. Croxford*, 324 F. Supp. 2d 1255, 1263-65 (D. Utah 2004); *United States v. Green*, No. CR. A. 02-10054-WGY, 2004 WL 1381101, at *24 n.233 (D. Mass. June 18, 2004) (explaining that the Guidelines can be viewed as defining "the maximum punishment permitted under all statutes affecting the punishment, including those that delegate lawmaking power").

B. Regardless of Whether the Guidelines Are Considered "Statutory," They Establish "Legal Right[s]" and Therefore Create Jury Rights

In any event, the government's claim that the upper end of a Guidelines range is not quite a "statutory maximum" is an irrelevant one. *Blakely* is focused not on the relationship between judiciary and legislature, but on the relationship between judge and jury that is at the heart of the Sixth Amendment. *See Blakely*, 124 S. Ct. at 2540 ("[T]he Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power.").[3] Accordingly, the

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[3] *See generally Blakely*, 124 S. Ct. at 2549 (O'Connor, J., dissenting) ("The fact that the Federal Sentencing Guidelines are promulgated by an administrative agency nominally located in the Judicial Branch is irrelevant to the [*Blakely*] majority's reasoning."); *United States v. Hammoud*, No. 03-4253, 2004 WL 2005622, at *37-42 (4th Cir. Sept. 8, 2004) (Motz, J., dissenting) (stating that "[c]lose examination of *Blakely* quickly reveals that the Supreme Court never relied on the . . . assertedly dispositive fact" that the Washington guideline was a statute); *United States v. Marrero*, 325 F. Supp. 2d 453, 456 (S.D.N.Y. 2004) ("[W]hile [prior to the Feeney Amendment] the Sentencing Guidelines have been technically viewed as emanating from the Judicial Branch rather than from Congress, . . . this is irrelevant from the

relevant question as defined by *Blakely* is whether there is a *legal right* to a particular sentence – whether, as a matter of public policy (and not simply of case-by-case judicial discretion), a sentence explicitly turns on particular facts. *See id.* (explaining that in an indeterminate sentencing system the facts relied upon "do not pertain to whether the defendant has a legal *right* to a lesser sentence – and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned"); *see also* Vikram David Amar, *When – If Ever – Can Facts Found By Judges Lengthen Criminal Sentences?* (Sept. 7, 2004), *at* http://writ.news.findlaw.com/amar/20040907.html. In such a circumstance, the defendant has the basic constitutional right to a jury determination of the relevant facts. The Sentencing Guidelines most certainly do constrain judicial decisionmaking so as to create just such legal rights – and the results of adjudication of those rights by judges rather than juries are often unjust, as numerous members of the federal judiciary have long insisted.

1. *Judicial fact-finding under the Guidelines increases sentences tremendously.* As an initial matter, it is worth remembering that the *Blakely* problem in the federal context is not an academic one: the finding of facts by judges under the Guidelines makes an enormous difference to defendants, who obviously care far more about the length of their imprisonment than they do about the labeling of the crime of which they have been convicted. One study of the Guidelines "found that half of all sentences had been increased – sometimes doubled or tripled – by uncharged conduct," which is attributed to defendants under a preponderance of the evidence standard without any of the standard criminal procedural protections. Rachel E. Barkow,

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standpoint of *Blakely*, which focuses on the manner in which the Constitution confides to the jury certain prerogatives that no other body . . . can override.").

Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing, 152 U. Pa. L. Rev. 33, 94 (2003); *see also Green*, 2004 WL 1381101, at *10 (noting that determinations made by the judge at sentencing "may theoretically double or triple the sentence [the defendant] receives upon the offense of conviction"). Sentencing under the current "real offense" approach is thus not very far removed from the "absurd" hypotheticals posited in *Blakely* to illustrate why every defendant must have "the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Blakely*, 124 S. Ct. at 2543; *see also id.* at 2539 (explaining that permitting judge-determined sentencing factors "would mean, for example, that a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it – or of making an illegal lane change while fleeing the death scene"); *United States v. Smiley*, 997 F.2d 475, 483 (8th Cir. 1993) (Bright, J., dissenting) (suggesting that Guidelines sentencing, where no rules of evidence apply and where sentencing judges often summarily approve probation officer recommendations, is reminiscent of Alice in Wonderland).

The impact of judicial factfinding is perhaps most obvious in drug cases such as the two cases at hand. *See, e.g., United States v. Fanfan*, No. 03-47-P-H (D. Me. June 28, 2004) (refusing to find post-conviction facts raising guideline range from 63-78 months to 188-235 months); *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004).[4] But

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[4] *See also, e.g., Green*, 2004 WL 1381101, at *41 ("[C]onsideration of the [uncharged] conduct here would result in a Guideline range increase from approximately six to eight years, to approximately twenty-four to thirty years. Such an increase is enormous . . . . The 'relevant conduct' here represents more than an 'enhancement'; it is the conduct for which Green would be sentenced." (footnote omitted)); *United States v. Pineiro*, 377 F.3d

the impact is also felt in cases involving regulatory infractions and the like, in which the post-conviction focus on the quantity of money involved in the "real offense" often results in sentences many times greater than what was possible under the original charge. *See* David Yellen, *Illusion, Illogic, and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 Minn. L. Rev. 403, 451-52 (1993) ("For crimes like larceny [and] fraud . . . the quantity or value involved drives the sentence, a fact that is often beyond the defendant's control or expectations. The effect of these amounts is magnified because alleged related-offenses, in which the defendant may not have participated personally, are aggregated and the amounts count as much for relatively minor participants in the offense as they do for more culpable individuals. This irrationality, combined with widespread plea bargaining manipulation and evasion, results in Guideline ranges that may not reflect anything near the defendant's true culpability." (footnote omitted)).

For example, in *United States v. Thurston*, 358 F.3d 51 (1st Cir. 2004), *petition for cert. filed*, 72 U.S.L.W. 3769 (U.S. June 16, 2004) (No. 03-1670), the district judge's fact-

464, 466-67 (5th Cir. 2004) (upholding sentence in case in which jury found defendant guilty of conspiring to distribute less than 50 kilograms of marijuana and 50 grams or less of cocaine, but sentence was based on findings by judge of much higher quantities of drugs); *United States v. Rodriguez*, 73 F.3d 161, 162-63 (7th Cir. 1996) (Posner, J., dissenting from denial of rehearing en banc) (noting increase from a range of 18-24 months, based on 10 ounces of marijuana proved at trial, to life in prison without the possibility of parole, based on evidence at sentencing of more than 1,000 kilos of marijuana); *United States v. Colon*, 961 F.2d 41, 41-43 (2d Cir. 1992) (affirming approximate tripling of the applicable sentencing range based on judge-found facts about the same course of conduct as the offenses of conviction); *United States v. Ebbole*, 917 F.2d 1495, 1495-96 (7th Cir. 1990) (increase for sentencing purposes from one gram of cocaine to 1.7 kilograms).

finding as to the amount of loss involved in a non-violent crime resulted in a far more severe punishment than that to which the defendant would otherwise have been subject. Thurston was convicted of one count of conspiracy to defraud the United States in violation of 18 U.S.C. § 371, and his base offense level under the Guidelines was six. Because the judge determined at sentencing that the intended loss was high (and found various other aggravating facts), the offense level was increased to twenty-six, and the applicable Guidelines range went from 0-6 months up to 63-78 months, which exceeded the statutory maximum of five years. *See United States v. Thurston* Mot. to Amend Pet. for a Writ of Cert. at 2-3. Because Thurston's more culpable co-defendant pled nolo contendere and received probation (with the agreement of the government), the district court departed from the Guidelines and imposed a reasonable three-month prison sentence on Thurston. The Government appealed, and the court of appeals reversed, holding that the "guidelines bind us and they bind the district court. The downward departure based on disparity in sentences among co-defendants was impermissible." *Thurston*, 358 F.3d at 54-55, 78.

Judge-found facts result in similar increases in punishment in many similar non-violent cases. *See, e.g.*, http://sentencing.typepad.com/sentencing_law_and_policy/2004/07/martha_is_getti.html (discussing case of Jamie Olis, a mid-level executive who was sentenced to 24 years in prison based on finding that the company's fraud involved a huge financial loss, although Olis himself realized no personal gain).[5]

[5] To fully appreciate the draconian nature of sentences meted out today under the Guidelines, one must consider that under the pre-Guidelines system, defendants sentenced to prison for more than one year were generally eligible for parole after serving one third

2. *The Guidelines create a determinate, rather than an indeterminate, sentencing system, and thus create "legal right[s]" within the meaning of* Blakely. In mandating these results, the Guidelines do not – as the government repeatedly insists – simply "channel" judicial discretion that would otherwise exist under an indeterminate sentencing system. Rather, they create legal rights under a determinate sentencing system. As discussed above, judges are bound by the Guidelines, which they must adhere to on pain of reversal. As a district judge in Texas recently explained:

> [I]t would . . . take a legal fiction of the highest order embracing the proposition that the existing Guidelines, which bind a sentencing court to procedures on peril of reversal, are no more than a court rule guiding a judge through sentencing and therefore constitute a form of agreement with the Commission by which discretion is

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of the sentence imposed. *See* 18 U.S.C. § 4205(a) (1976) (repealed 1984). Thus, under the pre-Guidelines system, if a first offender had been sentenced to prison for the statutory maximum of five years for conspiracy as the Guidelines call for in *Thurston*, or for the eight years imposed for importing frozen lobster tails in the wrong package as in *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003) – extraordinary sentences in their own right – that offender would have been eligible for and likely would have received parole after serving one third of the sentence imposed (and, in some cases, even earlier). Defendants convicted of certain minor environmental violations and sentenced to prison in the pre-Guidelines era would have been eligible for parole after serving only 0 to 10 months of their sentence. *See* 28 C.F.R. § 2.20, Chapter Eleven, Subch. H – Environmental Offenses, 1172(d); B. Sharp & L. Shen, *The (Mis)Application of Sentencing Guidelines to Environmental Crimes*, BNA Toxics L. Rpt'r 189 (July 11, 1990). Thus, the post-Guidelines sentences of five years for Thurston and eight years for the McNab defendants are in some sense equivalent to staggering pre-Guideline prison sentences of 15 and 24 years, respectively.

> ceded in exchange for predictability. Only such a fabrication would explain why an offender has rights under statutory guidelines and lacks the same rights under a regulatory guideline.

United States v. Chaparro, No. Crim. EP-92-CR-283KC, 2004 WL 1946454, at *10 (W.D. Tex. Sept. 1, 2004). And federal judges have repeatedly complained that the Guidelines' "wholly mechanical sentence computation" reduces the judiciary to "automaton[s]," "rubber-stamp bureaucrat[s]," or "accountant[s]." Luna, *Misguided Guidelines*, *supra*, at 28 n.87 (collecting cases and other sources); *see also Green*, 2004 WL 1381101, at *10 ("To call our present federal sentencing structure a 'guidelines' system suggests that the district judge still plays a central role. She does not. Other than determining the controlling sentencing factors . . . , the district judge's role is purely mechanistic, applying arithmetically the sentencing factors . . . ."); Remarks of Hon. Morris E. Lasker before the Symposium on Sentencing Guidelines, Sept. 9, 1997, *available at* www.november.org/dissentingopinions/Lasker.html.[6] Notably, the federal Guidelines are far more

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[6] Indeed, the importance of fact-finding at the sentencing stage actually shifts a great deal of power away from judges and into the hands of prosecutors. Prosecutors may pick and choose which facts to present to the judge at sentencing, and may thus evade rules of evidence, discovery rules, and the like. *See Green*, 2004 WL 1381101, at *4, 10 ("[T]he concept of 'real offense' sentencing as practiced under the Guidelines not only affects where – within the permissible range – an offender ought be sentenced, it frequently adjusts that range upward considerably. . . . While there may still be judicial limits on the outer boundaries of a prosecutor's assertion of relevant conduct . . . , none prevents a prosecutor from turning a blind eye on conduct otherwise relevant . . . . So it is that the phenomenon known as 'fact bargaining' has come to flourish as never before in

comprehensive and inflexible than were Washington's sentencing laws. *See Blakely*, 124 S. Ct. at 2549-50 (O'Connor, J., dissenting) (noting "hard constraints" of federal Guidelines as compared to soft constraints of Washington system); Bibas, *supra*, at 5.

The government nevertheless suggests that the Guidelines are closely akin to a purely indeterminate sentencing system under which certain channeling rules – stricter sentences within a drug crime statutory range for use of a firearm, for example – could develop over time and be enshrined in judicial precedent. *See* Gov't Br. at 23-24. But such a system of precedent would be a very different kind of constraint, and would establish very different kinds of legal expectations for defendants, than the Guidelines. By definition, the judicial precedent that the government hypothesizes would operate on a case-by-case basis, with judges constantly creating exceptions, distinguishing prior case law, and overruling existing precedent. Sentencing discretion would still exist, and the "rules," such as they were, would bend appropriately for each defendant based on his own particular circumstances. The Guidelines, directly controlled by Congress, do not bend in this fashion; individual cases must be shoe-horned into them, and binding legal rights and expectations are thus created.

In addition, unlike an indeterminate sentencing system, the Guidelines include no "structural democratic constraints" in fixing the proper range of punishment for particular crimes. *Apprendi*, 530 U.S. at 490 n.16; *see also* Gov't Br. at 26. In an indeterminate system, the legislature has a responsibility to come up with a sentencing range that is

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the federal courts. . . . The rules of evidence by their express terms do not apply to sentencing hearings. Instead, courts today must base their conclusions on a mishmash of data including blatantly self-serving hearsay largely served up by the Department.").

truly proportional to the crime, because there is a real possibility that defendants will receive sentences anywhere within the range chosen – and the legislature can be held accountable for its choices. But because under the Guidelines system the real work of sentencing happens in a Commission that the government insists is independent from the legislative branch, Congress is free to pass statutes that prescribe a sentence between 0 and 100 years for minor and major crimes alike – and juries, the democratic constraint within the judicial system, have no opportunity to decide the facts that actually determine whether a sentence is 0 years, 100 years, or somewhere in between.[7] As *Blakely* explained, a bright-line rule that "every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to punishment," *Blakely*, 124 S. Ct. at 2543, is far preferable to an attempt to decide in each case whether the tail of the sentence wags the dog of the crime. *See McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986) (discussing possibility that a "sentencing factor" may be a "tail which wags the dog of the substantive offense").

3. *The determinacy of the Guidelines is not altered by the existence of judicial authority to depart.* The *amicus* brief filed by a group of former federal judges acknowledges that the applicability of *Blakely* turns on the degree to which the Guidelines are determinate – the extent to which they truly create legal rights for defendants by binding judges

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[7] *See Hammoud*, 2004 WL 2005622, at *37-42 (Motz, J., dissenting) (explaining that if *Blakely* does not apply to federal guidelines, "Congress can choose *not* to criminalize conduct yet still *require* the Sentencing Commission to develop guidelines mandating punishment of that very conduct upon a judicial finding by a mere preponderance of the evidence"); Note, *The Unconstitutionality of Determinate Sentencing in Light of the Supreme Court's "Elements" Jurisprudence*, 117 Harv. L. Rev. 1236, 1253 (2004).

rather than simply guiding them. *See* Br. of *Amici Curiae* An Ad Hoc Group of Former Federal Judges at 9 (hereinafter "Former Judges' *Amicus* Br.") ("[I]n evaluating the constitutional soundness of the Sentencing Guidelines under *Blakely*, this Court must consider whether the Sentencing Reform Act of 1984 established the type of determinate statutory sentencing scheme at issue in *Blakely*, or rather, whether the Guidelines represent a sentencing regime more analogous to the traditional indeterminate scheme . . . ."). But the judges assert that the Guidelines are more indeterminate than determinate because, among other things, "as this Court recognized in *Koon*, judges retain substantial discretion to depart from the Guideline-calculated sentencing range." *Id.* at 10; *see also* Br. *Amicus Curiae* the U.S. Sentencing Comm'n at 4 n.3 (highlighting "judges' discretion to depart from a prescribed guideline in a particular case").

This assertion ignores the realities of the current sentencing regime, under which judges' ability to depart from the Guidelines is severely constrained. A district judge must justify a departure by reference to factors specified in the Guidelines themselves or by determining "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b); *see also* U.S.S.G. § 5K2.0. Thus, a judge confronting a sentence that is unduly harsh precisely *because* a certain circumstance – such as amount of monetary loss or drug quantity – has been given great weight in the Guidelines has little or no recourse. *See, e.g., United States v. Weinberger*, 91 F.3d 642, 644 (4th Cir. 1996). Sitting federal judges have repeatedly expressed their frustration with this state of affairs and their sense of constraint. *See, e.g.*, Luna, *Misguided Guidelines*, *supra*, at 28 n.87

(collecting cases and other sources).

It is thus not surprising that, once departures requested by the government (as a reward for "substantial assistance," for example) are discounted, the rate of departure has been very low. The very statistics cited by the former judges demonstrate that the majority of federal circuits had a departure rate under 10% in fiscal year 2002. *See* http://www.ussc.gov/ANNRPT/2002/table26.pdf. Similarly, "[i]n 2001, the Sentencing Commission estimated the rate of non-substantial assistance departures not initiated by the government to be 10.9%." *Kennedy Comm'n Report*, *supra*, at 40 (citing U.S. Sentencing Comm'n, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 64, fig. 16 (2003)).

And judges' ability to depart has recently been restricted yet further by the enactment of the 2003 Feeney Amendment, a development that the former judges attempt to dismiss in the course of a brief footnote. *See* Former Judges' *Amicus* Br. at 3 n.2. The Feeney Amendment legislatively overruled this Court's decision in *Koon v. United States*, 518 U.S. 81 (1996), and provided for de novo review (rather than review for abuse of discretion) of district court departure decisions. Congress also instructed the Commission to amend the guidelines in order to "substantially reduce" the rate of judicially initiated departures. *See* PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650 (2003). In addition, Congress limited the availability of combination-of-factors departures and, in cases involving sexual offenses against children, limited the permissible bases for departure to those factors expressly identified explicitly in the Guidelines. *See id.*; *see also Green*, 2004 WL 1381101, at *12-15.

The impact of this amendment has been substantial. For example, in the *Thurston* case discussed above, the district

court judge attempted to depart downward on the ground that Thurston's sentence was immensely harsher than the sentence of his more culpable co-defendant, who had pled nolo contendre and received just three years probation and a small fine. *See Thurston*, 358 F.3d at 53-54, 60-61; *Green*, 2004 WL 1381101, at *4 & n.26. But the Court of Appeals, applying the non-deferential standard mandated by the PROTECT Act, reversed this departure, finding that the disparity was not a permissible ground for reducing Thurston's sentence. *See Thurston*, 358 F.3d at 71-79. There are many additional cases in which the Guidelines have bound judges despite shocking sentence disparities. *See, e.g.*, Sentencing Hearing, *United States v. Angelos*, 02-CR-708-ALL (D. Utah Sept. 14, 2004) (Cassell, J.) (questioning by judge of rationality of federal law requiring sentence of 63 years for first-time marijuana dealer who possessed a gun where Guidelines require substantially lesser sentences for child rapists and terrorists who explode bombs in public places); http://sentencing.typepad.com /sentencing_law_and_policy/booker_and_fanfan_commentary/ (discussing *Angelos* case).

II. APPLICATION OF *BLAKELY* TO THE GUIDELINES WILL RESULT IN SENTENCING REFORM THAT FULFILLS THE GOALS OF THE SRA AND RESPECTS DEFENDANTS' SIXTH AMENDMENT RIGHTS.

Amici do not address the issue of whether, as a matter of severability analysis, the Guidelines as a whole must fall because portions of the Guidelines violate the Sixth Amendment by requiring courts to find sentence-enhancing facts. But it is clear that invalidation of the Guidelines by this Court – whether in whole or in part – will not create chaos in the federal criminal justice system, as the government has previously suggested. *See, e.g.*, Br.. for the U.S. as *Amicus Curiae* Supporting Respondent in *Blakely v.*

Washington, No. 02-1632, 2004 WL 177025, at *30-31 (U.S. filed Jan. 23, 2004). In those circuits that have ruled over the last several months that *Blakely* applies to the Guidelines, the lower courts and the U.S. Attorney's Office have already taken concrete steps to address the resulting practical issues. In addition, there are a number of viable options for broader sentencing reform, many of which are already under consideration by Congress, that would honor the crucially important Sixth Amendment rights described in *Blakely* while at the same time fulfilling the original goals of the SRA. *See generally, e.g.*, Blakely v. Washington *and the Future of the Federal Sentencing Guidelines: Hearings Before the Senate Comm. on the Judiciary*, 108th Cong. (July 13, 2004) (hereinafter "Senate *Blakely* Hearings") (testimony of The Honorable John Steer, Vice Chair and Commissioner, United States Sentencing Comm'n) ("Even if *Blakely* is found to apply to the federal guidelines, the waters are not as choppy as some would make them out to be."), *available at* http://judiciary.senate.gov/hearing.cfm?id= 1260. These reform efforts present an opportunity to replace the harsh and irrational Guidelines with more humane and even-handed sentencing policies and procedures.

In *Mistretta v. United States*, 488 U.S. 361 (1989), this Court described the SRA as a response to two problems. First, the Act addressed the "uncertainty as to the time the offender would spend in prison" that was the result of the operation of the parole system. *Id.* at 366; *see also* 18 U.S.C. § 3553(a). Second, and more centrally, the Act attempted to reduce what was thought to be "the great variation among sentences imposed by different judges on similarly situated offenders."[8] *Mistretta*, 488 U.S. at 366; S. Rep. No. 98-225,

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[8] In fact, sentencing disparities that existed in the federal system before the passage of the Guidelines apparently were minor or statistically insignificant and not based on impermissible factors

at 1 39 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3222. Nothing in *Blakely* "impugns these salutary objectives" – the only question is how they can be realized in a constitutionally permissible manner. *Blakely*, 124 S. Ct. at 2540 ("This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment.").

In the wake of *Blakely*, Congress immediately held hearings on this question, and now stands poised to act once the Court issues its ruling in the instant case. *See* Senate *Blakely* Hearings, *supra*; *see also* S. Con. Res. 130, 108th Cong. (July 22, 2004) (discussing *Blakely* issues and seeking resolution by this Court of constitutionality of Guidelines); Memorandum from James Felman to U.S. Sentencing Comm'n, Legislative Solutions to *Blakely* (Sept. 16, 2004), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/felman_blakely_proposal.rtf. Congress has considered a variety of different proposals for carrying out the goals of the SRA while ensuring that "every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to punishment." *Blakely*, 124 S. Ct. at 2543. These proposals include mandating that sentencing ranges be determined by factors charged in the indictment and found by the jury; making the current Guidelines advisory, rather than mandatory, while permitting judges to

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such as race and ethnicity. *See* Kate Stith & Jose A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 105-42 (1998). "It bears emphasizing . . . that an examination of . . . early studies and other data from the pre-Guidelines period belies the notion that sentencing in the federal courts was 'shameful,' 'lawless,' or 'arbitrary.'" *Id.* at 111. Indeed, an empirical study of pre- and post-Guideline sentences conducted by the Department of Justice's Bureau of Justice Statistics suggests that disparities in sentencing of different racial or ethnic groups may have *increased* under the Guidelines. *Id.* at 124.

exercise sentencing discretion; and bringing the Guidelines sentencing ranges into better alignment with the ranges set forth in the statutes criminalizing underlying offenses. *See* Senate *Blakely* Hearings, *supra*; *see also generally* Note, *The Unconstitutionality of Determinate Sentencing in Light of the Supreme Court's "Elements" Jurisprudence*, 117 Harv. L. Rev. 1236, 1253 (2004).

The first of these options was noted with approval by the majority in *Blakely*, which discussed the aftermath of a decision by the Kansas Supreme Court that applied *Apprendi* to hold that aggravating facts under the Kansas sentencing guidelines must be found by juries rather than judges. *See Blakely*, 124 S. Ct. at 2541 (citing *State v. Gould*, 271 Kan. 394, 404-14 (2001)). The Kansas legislature complied with the decision by setting up a bifurcated proceeding in which juries are asked at the sentencing stage to assess aggravating facts under a reasonable doubt standard. *See id.* ("When the Kansas Supreme Court found *Apprendi* infirmities in that State's determinate sentencing regime . . . , the legislature responded not by reestablishing indeterminate sentencing but by applying *Apprendi*'s requirements to its current regime"). This approach could readily be adapted for the federal context – and doing so might have the salutary effect of simplifying the sentencing process considerably. *See* Senate *Blakely* Hearings, *supra* (testimony of Prof. Rachel Barkow); Letter from Jon M. Sands, Chair, Sentencing Guidelines Comm. of the Federal and Community Defenders, to United States Sentencing Comm'n (July 9, 2004) (attaching a recommendation to Congress to amend 18 U.S.C. § 3553 that is modeled on the legislative action taken in Kansas); *see also Harris v. United States*, 536 U.S. 545, 581-82 (2002) (Thomas, J., dissenting) ("The United States concedes . . . that it can charge facts upon which a mandatory minimum sentence is based in the indictment and prove them to a jury."). This legislative approach would also protect

defendants' jury rights and promote certainty of punishment and uniformity, as all offenders would be granted the same protections and would serve out their full sentences as based on the jury-found facts of their cases.[9]

Adopting this or one of the other proposals under consideration will not require Congress to reinvent the wheel. Of course, the Sixth Amendment must be vindicated in the imposition of punishment on federal criminal defendants, regardless of the level of cost or difficulty involved in changing the current system. *See Blakely*, 124 S. Ct. at 2543 (noting that the issue is not "whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice"). But meaningful reform within the bounds of the Constitution is eminently possible without major disruption and without rewriting the thousands and thousands of pages that comprise the current Guidelines. Rather, Congress can build upon its existing "considered legislative effort." Br. for Hon. Orrin G. Hatch, Hon. Edward M. Kennedy, and Hon. Dianne Feinstein as *Amici Curiae* at 6.

At the same time, however, the partial or complete invalidation of the current federal sentencing scheme on *Blakely* grounds would give Congress the broader opportunity to address the many fundamental flaws and unfairnesses in the harsh federal Guidelines. These various problems have been well described by the federal judges responsible for imposing the sentences that the Guidelines mandate. *See, e.g.*, Judge John S. Martin, Jr., *Let Judges Do Their Jobs*, N.Y. Times, June 24, 2003, at A31 (explaining that he was retiring because he could no longer in good

[9] Creation of new procedures that base Guidelines calculations on jury findings, while obviously within the competence of the legislature, also fall within the inherent powers of the federal courts.

conscience sentence under the Guidelines regime); Luna, *Misguided Guidelines*, *supra*, at 3 (citing federal judges' descriptions of the guidelines as a "dismal failure," "a farce," "out of whack," "a dark, sinister, and cynical crime management program" with "a certain Kafkaesque aura about it," and "the greatest travesty of justice in our legal system this century," as well as polls finding that large numbers of federal judges are opposed to the operation of the guidelines); *see also generally Kennedy Comm'n Report*, *supra*, at 34-46; ALI Report, *Model Penal Code: Sentencing* 124 (Apr. 11, 2003) ("One of the most profound and controversial effects of the federal sentencing guidelines has been to increase the average severity of penalties in the federal system . . . markedly overall."); Michael Tonry, *Sentencing Matters* 72 (1996) ("[T]he guidelines developed by the U.S. Sentencing Commission . . . are the most controversial and disliked sentencing reform in U.S. history.").

In particular, as discussed above, the Guidelines in their current form have failed dismally in their attempt to reduce disparities between similarly situated offenders, and have thus opened a wide gulf between the "real offense" and real punishment. Indeed, if anything, the Guidelines have resulted in far more irrational and unjust distinctions than the prior indeterminate sentencing system, driven in part by a shift in power from judges to prosecutors and in part by a myopic focus on certain types of facts. *See* Luna, *Misguided Guidelines*, *supra*, at 15 ("By privileging certain facts, particularly quantifiable details such as monetary loss or drug quantity, while ignoring morally relevant factors about the offender and his life, federal sentencing creates the illusion of eliminating unwanted disparities."); James A. McLaughlin, *Reducing Unjustified Sentencing Disparity*, 107 Yale L.J. 2345, 2348 (1998) ("Commentators have identified numerous sources of disparity in Guidelines sentencing . . . .

Moreover, judges appear to have grown frustrated by the Guidelines' inability to resolve these problems."); *Green*, 2004 WL 1381101, at *2 (describing a system that "has shifted far away from trials and juries and adjudication to a massive system of sentence bargaining that is heavily rigged against the accused citizen").

Congress now has an opportunity to correct these intolerable problems while at the same time crafting Sixth Amendment protections. For instance, in implementing a Kansas-like solution, which itself reduces prosecutors' power to engage in forbidden fact bargaining, Congress could choose to deemphasize in sentencing the monetary amount involved in financial crimes, or to reintroduce factors such as family circumstances and community service that the current Guidelines discount. In undertaking such changes, Congress has two decades of Guidelines experience and data on which to draw – and can also consider the lessons learned in the "laborator[ies]" of the states, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), many of which have adopted well-regarded sentencing guideline regimes that rely much less heavily on "real offense" fact-finding by judges than does the current federal system. *See, e.g.*, *Kennedy Comm'n Report*, *supra*, at 35 ("The wide-spread criticism of the federal guideline system stands in sharp contrast with the general acceptance and high regard in which the state guideline systems are held.").

Application of *Blakely* to the Guidelines should thus be viewed not as an invitation to disaster, but rather as an invitation for legislative innovation and improvement. *See, e.g.*, Senate *Blakely* Hearings, *supra* (testimony of The Honorable Paul Cassell, United States District Court Judge, District of Utah) ("[W]hile *Blakely* may be viewed as a short term problem requiring an immediate solution, perhaps with longer perspective it can viewed as spur for discussion and

improvement."). "In short, it is time for a second look." *Kennedy Comm'n Report*, *supra*, at 37 ("We conclude that it is time for Congress to revisit the federal guidelines and to examine carefully the reasons why there has been so much negative reaction to and criticism of them . . . .").

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to apply the Sixth Amendment principles set forth in *Blakely* to the federal Guidelines.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

No. 04-104 (20)

UNITED STATES OF AMERICA, PETITIONER

v.

FREDDIE J. BOOKER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 04-105 (19)

UNITED STATES OF AMERICA, PETITIONER

v.

DUCAN FANFAN

ON WRIT OF CERTIORARI BEFORE JUDGMENT
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

LODGING

LODGING
Estimate of Number of Cases Possibly Impacted by the Blakely Decision

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[See Attached Service Lists]

Paul D. Clement
Acting Solicitor General
Counsel of Record

October 8, 2004

M E M O R A N D U M

To: Tim McGrath

From: Lou Reedt

Date: July 20, 2004

Subject: Estimate of Number of Cases Possibly Impacted by the Blakely Decision

The decision in Blakely v. Washington has the potential to impact both the court workload and defendant sentences. This estimate below uses the FY02 Commission dataset to identify the number of cases having sentencing enhancements that might be affected by the Blakely decision. At this time, it is not possible to estimate the magnitude of the impact, if any, on offender sentences however, data is being collected to address this question.

It is difficult to estimate with certainty the potential number of defendants affected by the decision in Blakely as well as what the effect might mean for the court workload. While a large number of cases may, at first blush, appear to be exposed to a Blakely effect, it is likely that far fewer cases will actually be affected because most cases result in pleas accompanied by plea agreements which may contain stipulations of facts, such as quantity of drugs or dollar loss amounts, applicability of guideline enhancements, or Blakely waivers. Consequently early estimates may be substantially over inclusive.

As a cautionary note, during this initial unsettled period it should be expected that the new uncertainty may affect the workload of the court community. It can be expected that in the longer term, either solutions to 'fix' the problem will be employed where available and where not available, a return to preguideline pleading practices (which would be consistent with current state court practice) will return. Consequently making long term estimates on the currently available information may substantially overestimate the ultimate impact.

In FY02 64,366 cases were sentenced under the federal sentencing guidelines. Of these, we have complete sentencing information on 52,312. The following analysis is limited to these 52,312 cases. An initial estimate of the possible impact identified all cases having a chapter 2 or 3 sentence enhancement, an upward departure, or a cross reference application.[1] Of the 52,312 cases with complete sentencing data, 44.2 percent (n=23,138) met any of these criteria. A substantial

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[1]**Guidelines 2L1.1, 2L1.2, 2L2.1, and 2L2.2 contain an enhancement if prior convictions are present. This specific offense characteristic was not used to identify cases for possible Blakely effect.**

proportion of the remaining 29,174 cases involved drug trafficking offenses (n=17,430). The proportion of these remaining cases potentially exposed to a Blakely effect because the offenders base offense level was increased beyond the quantity specified in the plea or indictment may be estimated by eliminating from consideration those offenders who had an applicable mandatory minimum and a base offense level that identically corresponds to the relevant mandatory minimum (for this analysis, cases were identified in which there was a mandatory minimum of 5 or10 years and a corresponding base offense level of 26 or 32, respectively). Using this criterion, 4,335 cases will not be affected. Additionally, it is understood that in border states many drug cases with non citizen defendants involve only the quantity of drugs found on the person when arrested - i.e., there is no additional drug quantity found through relevant conduct to increase the drug quantity above indictment/plea levels. Eliminating these cases removes an additional 2,257 cases from consideration. The remaining drug cases (n=10,838) are then added to the previous estimate of cases possibly affected resulting in an estimated total of 33,976 cases (65.0% of the 52,312 cases sentenced in FY02 with complete sentencing information available) potentially affected by Blakely.

As stated earlier, this estimate may substantially overstate the effect of the Blakely decision on the workload of the court community. In FY02, 97.1 percent of cases sentenced under the guidelines were the result of plea agreements. Of the 33,976 cases estimated above, 96.5 percent pled guilty. Two forms that a plea may take are relevant for consideration at this time: 1) pleas pursuant to Rule 11(c)(1)(c) that bind the court to a specific sentence; and 2) plea agreements fully stipulating the relevant sentencing factors in the case. For both of these forms of plea agreement, it is expected that the Blakely decision will have minimal or no effect. Current limitations in data collection do not include information specifying the form of the plea agreement, however the availability of these forms of plea agreement suggests that the above estimate overstates the actual impact.

Further reducing the number of possibly affected cases is that in federal circuits in which the federal guideline sentencing scheme is found to be constitutional there will be no impact whether the defendant is convicted at trial or regardless of what form a plea agreement may take. Until all circuit courts have ruled however the extent to which the previous estimate can be reduced cannot be determined. In circuits in which the guidelines are found to be unconstitutional, the proportion of defendants choosing to go to trial may increase above current levels but there is no evidence to suggest that the proportion of trial cases will not continue to account for a relatively small proportion of federal sentencings. The preguideline trial rate in federal cases was 12.6 percent (1988). While greater than the current trial rate of 3.8 percent, this figure indicates that trials, even absent the presence of the federal sentencing guidelines, accounted for a small percentage of the federal criminal court workload.[2] That there is a relatively small proportion of defendants choosing to go to trial is consistent with the experience of state courts. It has recently been reported that the trial rate in 22

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[2]This data on federal sentencing was reported in the Sourcebook of Criminal Justice Statistics, 2002, page 421, a Bureau of Justice Statistics publication base on data provided by the Administrative Office of the U.S. Courts. While Sentencing Commission data is available for 2002, it is not available for 1984. For consistency purposes it was determined that this Bureau of Justice Statistic data be used at both time points (1984 and 2002). It is noteworthy that Commission data report a lower trial rate in 2002 (2.9%).

states has declined from eight percent of all court dispositions in 1984 to five percent of all dispositions in 2002.[3]

Finally, it is reasonable to assume that defendants who are cooperating with law enforcement, receiving a departure for providing substantial assistance to authorities under the federal guidelines, would have a greater likelihood of pleading guilty rather than going to trial. Among the estimated 33,976 cases cited above, 22.9 percent (n=7,764) received a departure for substantial assistance. This further lowers the estimated impact of the Blakely decision.

In conclusion, initial estimates of the impact of the Blakely decision on the workload of the federal court community should be viewed with caution. Activities occurring in this period immediately following the decision will likely not represent longer term responses by the field and cause substantial overestimation of the impact. While a large number of cases may, at first blush, appear to be exposed to a Blakely effect, it is likely that far fewer cases will actually be affected because of the availability of 'solutions' (*e.g.*, fully stipulated pleas, fully articulated indictments, waivers of Blakely, etc) in some courts or the likelihood that past practice will repeat itself (*i.e.*, historically high plea rates prior to the advent of the federal sentencing guidelines) in courts where these options are not available.

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[3]**The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, Compiled by Marc Galanter. Prepared for the Symposium on the Vanishing Trial, sponsored by the Litigation Section of the American Bar Association, San Francisco, California, December 12-14, 1003.**

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